

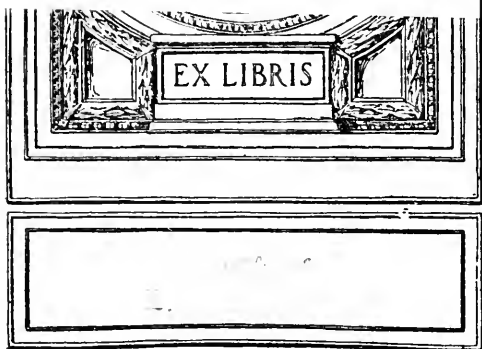


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BANKING CASES,

111

ANNOTATED.

A COLLECTION OF ALL

CASES AFFECTING BANKS DECIDED BY THE
COURTS OF LAST RESORT

IN THE

UNITED STATES.

EDITED BY

THOMAS JOHNSON MICHIE.

VOLUME I.

THE MICHIE COMPANY, PUBLISHERS.

CHARLOTTESVILLE, VIRGINIA.

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ALBANY, N. Y. 1899

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BANKING CASES.

VOLUME I.

SCANDINAVIAN-AMERICAN BANK

v.

PIERCE COUNTY *et al.*

(*Supreme Court of Washington, Nov. 11, 1898.*)

Taxation of Bank Stock—Non-resident Owners.*—The shares of non-resident stockholders in a banking corporation organized under the laws of Washington, and doing business within the state, can be taxed in the state for general, state, county, and municipal purposes.

APPEAL, by plaintiff from Pierce county superior court. *Affirmed.*

Fenley Bryan and *Wm. H. Pratt*, for appellant.
A. R. Titlow, *Pros. Atty.*, for respondents.

DUNBAR, J. The appellant sought to restrain the treasurer of Pierce county from seizing and selling its property in satisfaction of taxes levied upon shares of its stock for the years 1895 and 1896. Two causes of action are stated separately for each of said years. The complaint, in brief, is to the effect: That the plaintiff is a banking corporation organized under the laws of this state. That its capital stock consisted of 1,000 shares of the par value of \$100 per share. That at the time that the statement of the cashier of the bank was delivered to the county assessor, as required by law, 825 of said shares were owned by persons who were, and still are, nonresidents of this state. This was upon the assessment in 1895, and when the statement for the year 1896 was made 875 of said shares were owned by nonresidents. That an assessment

*See note at end of case.

Scandinavian-American Bank v. Pierce County

was made upon all of said shares thus owned by non-residents, as well as those owned by residents for each of said years, and that all of said shares were assessed and taxed for the years 1895 and 1896 in the states where the owners thereof reside, and that on such shares taxes have been paid. That appellant has tendered the county treasurer the full amount due for taxes levied upon the stock owned by residents of this state, and that it now is, and at all times has been, ready, willing, and able to pay that amount. The other allegations of the complaint are immaterial so far as the discussion of this question is concerned. A demurrer was interposed, stating seven different grounds, but with the view we entertain of the seventh ground, *viz.* that the complaint does not state facts sufficient to constitute a cause of action, a discussion of the other six grounds is rendered unnecessary. The question for decision under this ground of the demurrer is, can the shares of nonresident stockholders in a bank organized under the laws of this state, and doing business in this state, be taxed in this state for general, state, county, and municipal purposes? It is conceded by the appellant that the weight of authority is to the effect that the legislature has power to change the *situs* of stocks of nonresidents, and bring them within their own jurisdiction for taxation; but it insisted that the legislature of this state has not attempted to do this. Section 1 of chapter 124, which is the revenue law of 1893, and which is the law governing this case (as the same sections were incorporated in the law of 1895), provides: "That all real and personal property now existing, or that shall be hereafter created or brought into this state, shall be subject to assessment and taxation for the support of the state government, and for county, school, municipal or such other purposes as shall be designated by law, upon equalized valuations thereof, fixed with reference thereto on the first day of April at 12 o'clock, meridian, in each and every year in which the same shall be listed, except such property as shall be expressly exempted therefrom by the provisions of law." Section 21 of the same act provides that: "All the

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shares of stock in banks, whether of issue or not, existing by authority of the United States or of the state, and located within the state, shall be assessed to the owners thereof in the cities or towns where such banks are located, and not elsewhere; in the assessment of all state, county and municipal taxes imposed and levied in such place, whether such owner is a resident of said city or town or not, all such shares shall be assessed at their full and fair value in money on the first day of April in each year, first deducting therefrom the proportionate part of the value of the real estate belonging to the bank, at the same rate, and no greater, than that at which other moneyed capital in the hands of citizens and subject to taxation, is by law assessed. And the persons or corporations who appear from the records of the banks to be owners of shares at the close of the business day next preceding the first day of April in each year shall be taken and deemed to be the owners thereof for the purposes of this section." The construction placed upon this law by the appellant, if we understand it, is to the effect that, while the law requires that bank stocks which are subject to taxation shall be assessed in the city or town where the bank is located, it does not create or impose a tax on stock owned by nonresidents. The law does not declare that all the shares of stock in bank shall be taxed, but that they shall be assessed, and an argument is based upon the theory that assessment does not necessarily mean taxation, and it is contended that the intention of the legislature to tax this property cannot be gathered from the act. But while the argument advanced may be ingenious, it is not, to our mind, convincing, or even plausible. We do not think the language "all the shares of stock in banks" can be construed to mean all such shares as have their *situs* within the state, or all such shares as belong to residents of the state. This would be a strained and unnatural construction to place upon the language. Section 1 provides "that all real or personal property now existing, or that shall be hereafter created or brought into this state, shall be

Note

subject to assessment and taxation." We cannot understand how language more sweeping or comprehensive could have been used by the legislature. The shares in question evidently fall within the definition given of personal property by section 3 of the act, so that the legislative announcement is that the property in question shall be subject to assessment and taxation, and section 21 simply points out the mode or manner of securing the taxes provided for in section 1, and especially provides that this property shall be assessed in the city or town where such banks are located, whether such owner is a resident of such city or town or not. Following the fundamental rule of statutory construction, and construing all the different sections of the act together, it plainly appears that when the legislature enacted section 21, providing for the assessment of the shares of nonresident stockholders, they had in mind their assessment with a view to their taxation. In fact, the section explains itself by using the words "in the assessment of all state, county and municipal taxes imposed and levied in such place." This section would be the merest jargon if it did not have for its ultimate object the collection of the taxes on the property assessed. And if it is necessary to strengthen this view by reference to the further sections of the act, section 55 requires the assessor to make a list of all property assessed, while section 64 provides that for the purpose of raising a revenue for state, county, school, road, and other purposes the board shall levy a tax on all taxable property in the county as shown by the assessment roll. We think the law is not susceptible of the construction placed upon it by the appellant. The judgment will be affirmed.

SCOTT, C. J., and ANDERS, GORDON, and REAVIS, JJ., concur.

NOTE.

Taxation—Shares Held by Non-Residents.—A state may tax shares of stock in domestic corporations though owned by non-residents, when provision for such tax is made by the law under which the corporation is created. *Stockholders v. Board, etc.* (Va. 1891), 13 S.

Union & Planters' Bank *v.* City of Memphis

E. Rep. 407; *Faxton v. McCosh*, 12 Iowa 530; *Tappan v. Merchants' Nat. Bank*, 19 Wall. (U. S.) 500; *Nashville v. Thomas*, 5 Coldw. (Tenn.) 600; *Bedford v. Mayor, etc., of Nashville*. 7 Heisk. (Tenn.) 409; *First Nat. Bank v. Smith*, 65 Ill. 44. *Contra*, *Union Bank v. State*, 9 Yerg. (Tenn.) 490. And see *Cleveland, etc., R. Co. v. Pennsylvania*, 15 Wall. (U. S.) 300.

In *Mayor, etc., of Baltimore v. Hussey*, 67 Md. 112, it was held that stock representing the debt of the city of Baltimore, owned by a resident of New York, was not taxable by the State of Maryland.

In *Catlin v. Hull*, 21 Vt. 152, and *Redmond v. Rutherford Co.*, 87 N. Car. 122, it was held that choses in action belonging to a non-resident, in the hands of an agent within the state, may be taxed. This latter case quoted the opinion of CHIEF JUSTICE PEARSON, pronounced in *Alvany v. Powell*, 2 Jones Eq. (N. Car.) 51, to the effect that the doctrine that personal property is deemed to follow the person of the owner "is based upon a fiction which has no application to the question of revenue." A municipality has no authority to tax shares of stock in corporations within its jurisdiction, owned by persons residing elsewhere, unless such authority is expressly conferred by statute. *Evansville v. Hall*, 14 Ind. 27; *Conwell v. Connersville*, 15 Ind. 150; *Craft v. Tuttle*, 27 Ind. 332.

In *Griffith v. Watson*, 19 Kan. 23, it was held that shares of stock in a gas company in the city of Lawrence, owned by a resident of Wakarusa Township, could not be taxed by the city of Lawrence where he did not reside. The court said: "Said shares of stock must be considered as personal property . . . and must therefore be taxed, if taxed at all, to the holders thereof where such holders reside."

In *Gordon v. Mayor, etc., of Baltimore*, 5 Gill (Md.) 231, it was held that a general taxing power, "granted in the most comprehensive terms, and without any limitation as to the objects on which the power is to operate," was a sufficient authority for levying a municipal tax upon the bank stock of a corporation in the city owned by a non-resident.

 UNION & PLANTERS' BANK

v.

CITY OF MEMPHIS *et al.*

(*Supreme Court of Tennessee, April 2, 1898.*)

Taxation of Banks—Capital Stock—Charter Exemptions—Assessment.*—Though the charter of a banking corporation provides that "said company shall pay to the state an annual tax of one half of one per cent. on each share of stock subscribed, which shall be in lieu of all other taxes," its capital stock is not thereby exempted

*See note at end of case.

Union & Planters' Bank *v.* City of Memphis

from taxation: but the legislature has made no provision for its assessment.

Same—Privilege Tax.—Nor does such provision exempt the bank from paying a privilege tax upon its capital stock to the defendant municipality.

Res Adjudicata.—In deciding whether or not a statute impairs the obligations of a state contract, the supreme court is not bound by its previous decisions, except when they have been so long and firmly established as to constitute a rule of property; and the case of the City of Memphis *v.* Union & Planters' Bank, 91 Tenn. 551, 19 S. W. 758, is not conclusive.

Same.—The plea of *res judicata* in tax cases is to be limited to the taxes actually in litigation, and is not conclusive in respect of taxes assessed for other and subsequent years.

Limitations.—The defendant is entitled to collect a privilege tax for the six years next preceding the filing of the bill upon the capital stock of the complainant bank, the three year limitation under act 1895 (c. 5, subsec. 7) having no application.

APPEAL by defendants from Shelby county chancery court. *Reversed.*

Metcalfe & Walker, for appellants.

Carroll, Chalmers & McKellar, for appellee.

MCALISTER, J. This record presents a question of taxation. Complainant bank filed its bill in the chancery court of Shelby county to enjoin the city of Memphis and county of Shelby against the collection of taxes on its capital stock for the years 1896 and 1897. Two grounds of relief were outlined in the bill, *viz*: First. That the capital stock of said Union & Planters' Bank is exempt from general taxation by its charter or act of incorporation, which provides that "said company shall pay to the state an annual tax of one half of one per cent. on each share of stock subscribed, which shall be in lieu of all other taxes," and that this exemption has been adjudged by this court in two cases, which have the force of *res adjudicata*. Second. That, conceding the taxability of the capital stock, the legislature has made no provision for its assessment, but on the contrary has expressly declared, by section 10 of the act of 1895, that "no tax shall hereafter be assessed upon the capital stock of any bank, banking association or loan, trust,

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insurance or investment companies, but the shareholders in such bank or other associations shall be assessed and taxed upon the market value of their shares of stock therein." The city and county answered the bill; denying the want of power in the assessing officers to assess the capital stock of complainant bank, and denying, further, that the charter of said bank exempted its capital stock from taxation, or that said matter is *res adjudicata*, or that defendants are estopped by judgment. The city and county also filed cross bills for the collection of their taxes,—the amounts due the city for the year 1897, and the county for the year 1896, and also for the collection of city privilege taxes. It was admitted in a stipulation of agreed facts that the capital stock of complainant bank had been assessed by the board of equalization of Shelby county for the year 1896 at \$217,000, and that complainant bank could not rightly contest the assessment, so far as the amount thereof was concerned. The comptroller's certificate was attached to the stipulation showing the payment annually of the charter tax of one half of 1 per cent. The chancellor, upon the hearing, was of opinion the bank was not liable for any of said taxes, and thereupon dismissed defendants' cross bills, and perpetuated the injunction. Defendants appealed, and have assigned errors as follows, to wit: "(1) The court below erred in holding that it was bound to follow the case of *City of Memphis v. Union & Planters' Bank*, 91 Tenn. 551, 19 S. W. 758, and to decree in favor of the exemption from general taxation of the capital stock of the complainant bank. It should have been decreed that the capital stock was subject to general taxation. (2) In any event, the court should have held that the judgment in the said case of *City of Memphis v. Union & Planters' Bank*, *supra*, was not *res adjudicata* as against the state or county; the county not being a party to that proceeding at all, and the state a nominal party only,—the only real party thereto being the City of Memphis. (3) It should have been decreed that the capital stock was legally assessed at \$217,000;

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that the amounts due to the city and county, respectively, were as shown by the exhibits to the bill; and judgment in favor of the city and county, respectively, should have been rendered on the cross bill. (4) The bank should have been adjudged liable to the city for an annual privilege tax of \$600, under the provisions of the act of 1889 (section 2, subsec. 7), by which the legislature enacted a municipal privilege tax on each banking institution of \$1 on every \$1,000 of capital stock paid in; the capital stock of the complainant bank being \$600,000."

The first question to be decided is whether the property now sought to be taxed has been assessed; for assessment must precede taxation, and is an indispensable condition of the right to collect a tax. As already stated, the assessment act of 1895 provides that "no tax should hereafter be assessed upon the capital stock of any bank or banking association, but that the shares of stock should be assessed to the individual shareholder." Here is a direct legislative prohibition against any assessment of capital stock to the corporation for purposes of taxation, and a different system for the assessment of such stock is provided. The assessment of the capital stock of complainant bank to the corporation was made by the board of equalization of Shelby county, under section 51, c. 120, Acts 1895, which provides "that the county board of equalization shall have the power to add to the assessment lists any property subject to taxation and not assessed by the regular assessor." The act of 1895 further provides, *viz*: that all property—real, personal, and mixed—shall be assessed for taxation for state, county, and municipal purposes, except such as is declared exempt in the next section. Laws 1895, p. 203, § 1. After enumerating the exemption, it provides, "All other personal property whether belonging to individuals, corporations or firms." *Id.* p. 306, § 9 subd. 9. It is insisted on behalf of the city that these general provisions of the act of 1895 are amply sufficient to justify and require the assess-

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ment of the capital stock of this bank, and, such being the case, all particular provisions in hostility to the constitutional provision that all property must be taxed would fall. The constitution ordains that all property shall be taxed according to its value,—that value to be ascertained in such a manner as the legislature shall direct, so that taxes shall be equal and uniform throughout the state. Article 2, § 28. It is true that under well-settled decisions of this court the capital stock belonging to the corporation and the shares of stock owned by the stockholder are separate and distinct subjects of taxation, and the taxation of one is not the taxation of the other; nor is the assessment of both subjects duplicate taxation. *Railroad Co. v. Morrow*, 87 Tenn. 417, 11 S. W. 348; *State v. Bank of Commerce*, 95 Tenn. 226, 31 S. W. 993. The value of such stock, under the plain provision of the constitution, is to be ascertained in such manner as the legislature shall direct. The legislature, in its wisdom, has provided for the assessment of stock to the shareholder, and has determined that no tax shall be assessed upon the capital of the corporation. It was clearly within the power of the legislature to prescribe this method of taxing bank stock, and until the system is changed no *ad valorem* tax can be collected from the corporation on the capital stock. The mandate of the constitution requiring uniform taxation of uniform values is not self-executing, but depends for its enforcement upon appropriate legislation. This very subject is illustrated by a decision of this court in which the precise point was adjudged. In *State v. Butler*, 86 Tenn. 631, 8 S. W. 586, which was a proceeding for the collection of taxes claimed to be due the city of Memphis from the Bank of Commerce, it appeared that the assessment was upon the capital stock of the bank. The court held that “no recovery could be had upon such an assessment, since the act of 1873 provided that ‘no tax shall hereafter be assessed upon the capital of any bank or banking association’ etc., ‘but the stockholders in such banks * * * shall be assessed and taxed on the value of their

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shares of stock therein.' " Chapter 118, § 8. This decision has remained unreversed and unchallenged from that time to the present.

It is also claimed that said bank is liable to the city of Memphis for certain privilege taxes. In the case of City of Memphis v. Union & Planters' Bank, 91 Tenn.

556, 19 S. W. 760, an effort was made to collect privilege taxes from this bank for the years 1889, 1890, and 1891, inclusive, and this court adjudged the bank not liable. JUDGE CALDWELL said: "Complainant seeks, in addition to what has already been stated, to recover from the bank \$1,800, as privilege taxes for the years 1889, 1890, and 1891. These taxes are claimed from the corporation for the right of exercising its franchises,—for the privilege of doing a banking business. Manifestly, the charter tax was intended to cover this right or privilege. The language of the charter implies that in consideration of the public good, and the payment of the tax therein specified, the state will allow the corporation to exercise the franchises granted, without further taxation,"—citing City of Memphis v. Hernando Ins. Co., 6 Baxt. 527; Union Bank v. State, 9 Yerg. 490. In reply to this adjudication, counsel for the city argues, *viz*: "It is not in the least denied, on our part, that this court has over and over again, under just such a charter as this, held that the corporation was not liable to a privilege tax. This line of decisions began with the case of Union Bank v. State, in 9 Yerg. 490, and runs through all the decisions on that subject down to and including the cases in 91 Tenn. It is, however, never to be forgotten that throughout this whole line of decisions this court was uniformly and consistently holding that under such a charter as this the charter tax was laid on, and the exemption was of, the corporation and its capital stock, and that the shares of stock were taxable. All that line of decisions has now been reversed by the supreme court of the United States; that court holding that, under the proper reading and legal effect of the charter, the charter tax is on, and the exemption

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is of, the shares of stock, and that the corporation gets no exemption whatever under the charter. If it be true, therefore, as it seems undoubtedly to be, that the capital stock is taxable, for the reason that the corporation gets no exemption under the charter, there would seem to be no reason why the corporation should not be liable to a privilege tax as well as to an *ad valorem* tax. The court will remember that in the series of cases that were before it on demurrer in 91 Tenn., and on final hearing in 97 Tenn., the privilege tax under the statute above referred to was adjudged valid in every case where it was properly claimed in the pleadings, and in which it was held that the corporation had no exemption. There is no reason why the same rule of taxation should not apply to the complainant bank." The decision of this question is therefore necessarily dependent on the determination of the question whether the capital stock of said bank is now liable to taxation.

It is insisted in bar of the claim of the city of Memphis that the question has already been adjudicated, and two pleas of *res adjudicata* are interposed, Res Adjudicata. *viz:* First, the decrees of the supreme court of Tennessee in the case of *State v. Butler* (April term, 1884) 13 Lea, 400, wherein it was adjudged that the provisions in its act of incorporation that the company shall pay to the state an annual tax of one-half of 1 per cent. on each share of capital stock subscribed, which shall be in lieu of all other taxes, relieves it of the payment of the taxes now sought to be recovered; second, that the decree of this court in the case of *City of Memphis v. Union & Planters' Bank*, reported in 91 Tenn. 546, 19 S. W. 758, adjudged that the commuted tax prescribed by the charter was the grant of an immunity to said bank from the payment of *ad valorem* taxes to the city of Memphis upon its capital stock. The broad proposition asserted by counsel for complainant bank is that this court has by its decrees in *State v. Butler*, 13 Lea, 400, and in *city of Memphis v. Union & Planters' Bank*, 91 Tenn. 551, 19 S. W. 758, conclusively adjudged that the charter of complainant bank

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exempts both its capital stock and shares of stock from general taxation. It is not insisted by the bank that there is a judgment estopped against the county, nor could such an insistence prevail, since the county was not a party to the two cases now relied on as adjudicating the question here presented. It is well known that the opinion of this court in *City of Memphis v. Union & Planters' Bank*, 91 Tenn. 551, 19 S. W. 758, was brought about by what this court deemed to be the true construction and effect of the opinions in the *Farrington Case*, 95 U. S. 679, and the *Bank of Commerce Case*, 104 U. S. 493. In *City of Memphis v. Union & Planters' Bank*, this court said, *viz*: "Considering the decision of the United States supreme court in *Farrington v. Tennessee*, 95 U. S. 679, and *Bank v. Tennessee*, 104 U. S. 493, together, and giving them the controlling weight to which they are entitled, it cannot be held otherwise than that the charter tax of one-half of one per cent. is in lieu of all other taxes, whether against the bank, on its capital stock, or against owners, on shares of stock. Under the construction there given, the charter exemption includes both." It was added that, "as an original question, this court would hold as held in *City of Memphis v. Farrington*, 8 Baxt. 539, and charge the stockholders with an *ad valorem* tax, but is constrained to hold both exempt, under the controlling authority of the United States supreme court decisions." Since that time, in the *Union & Planters' Bank Case*, 161 U. S. 149, 16 Sup. Ct. 558, the supreme court of the United States held that the *Farrington Case*, properly understood, did not hold that both the shares and capital stock were exempt from taxation. It was further held that the charter tax was on the shares of stock, and such shares were exempt from general taxation. It is nevertheless urged on behalf of the bank that the *City of Memphis v. Union & Planters' Bank Case* is conclusive in its favor, regardless of the reasons that controlled the court in pronouncing judgment, and that it is conclusive, also, against taxes for other years. As is well said in the brief for the city :

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"It would indeed be strange if, under a constitution such as ours, a mistaken judgment of this court, declared in most emphatic terms not to be its own judgment, but to have been rendered in supposed obedience to that of an appellate tribunal,—the United States supreme court,—can be invoked as a judgment estoppel, now that the same appellate tribunal has decided that identical question in favor of the state and against the bank, and that this court was mistaken in its reading of their former opinions." It is argued, however, by counsel for the bank, that the opinion and judgment of the United States supreme court in *Shelby Co. v. Union & Planters' Bank*, 161 U. S. 149, 16 Sup. Ct. 558, did not adjudge the capital stock liable to taxation. The argument for the bank is that the single question involved therein was the taxability of the surplus, and that everything said in the opinion outside of this question was *obiter*. We understand that court to have decided, in the case mentioned, that the surplus and undivided profits of said bank were not exempt, for the reason that the capital stock of said bank was not exempt. The court said, *viz*: "There are two grounds, either of which, if decided in favor of the appellants in this case, would result in upholding the validity of the tax upon the surplus: First, if it should be held that, by the true interpretation of the charter, the exemption, while applying to the shares of stock in the hands of the shareholders, does not extend to the corporation itself, the tax would be invalid; second, even if the tax on the capital stock were void, that upon the surplus might still be upheld, on the authority of the case of *Bank of Commerce v. Tennessee*, 161 U. S. 134, 16 Sup. Ct. 456; *Id.*, 99 Tenn. 645, 36 S. W. 719. We have already held in that case that a tax on the surplus was valid, but the question whether a tax on the capital stock of the bank was valid could not be raised there, because the case was before us on writ of error taken to a state court, and the question in the state court was decided in favor of the exemption claimed by the bank. This being an appeal from a judgment of the United

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States circuit court, both questions are open for our decision. We think it therefore proper to here decide the question first above stated. Various decisions in the courts of Tennessee have been cited by counsel on both sides, as to the meaning of the exemption clause, —whether or not it covered the capital stock and the shares also. Generally the courts of that state held, before the decision of this court of *Farrington v. Tennessee*, 95 U. S. 679, that the charter tax was laid on the corporate capital stock, and the exemption was of that stock from any further tax. Subsequently to the decision in that case the state courts have held that under the construction given to the clause in the *Farrington Case*, and in *Bank of Commerce v. Tennessee*, 104 U. S. 493, the tax was on the shares, and the exemption covered both the capital stock and the shares thereof. The decision giving exemption to both classes of property was adjudged alone upon the authority cited. In such a case as this, where we are to construe the meaning of the clause of the statute as to what contract is contained therein, and whether the state has passed any law impairing its obligation, we are not bound by the previous decisions of the state courts, except when they have been so long and firmly established as to constitute a rule of property (which is not the case here); and we decide for ourselves, independently of the decisions of the state courts, whether there is a contract, and whether its obligation is impaired. *Railroad Co. v. Palmes*, 109 U. S. 244, 256, 3 Sup. Ct. 193; *Railroad Co. v. Dennis*, 116 U. S. 665-667; 6 Sup. Ct. 625; *Railroad Co. v. Tennessee*, 153 U. S. 486, 492, 14 Sup. Ct. 968." The court, after a review and discussion of the cases, held, *viz*: "This determines the liability of the capital stock of the Union & Planters' Bank to taxation, and, of course, it overrules any claim on the part of that bank for exemption from taxation of its surplus or accumulated profits." If, therefore, the principle of judgment estoppel is to be invoked, the last judgment of the highest appellate tribunal determines the taxability of said capital stock.

Notes

Again, we think the plea of *res adjudicata* in tax cases is to be limited to the taxes actually in litigation, and is not conclusive in respect of taxes assessed for other and subsequent years. Since this is not a federal question, we decline to follow the ruling in *City of New Orleans v. Citizens' Bank*, 167 U. S. 371, 17 Sup. Ct. 905, in which it was held, by a majority opinion, that a judgment in a tax case is as conclusive of the taxes of other years as it is of the taxes for the years actually involved. In *State v. Bank of Commerce*, 95 Tenn. 231, 31 S. W. 993, we said, "These suits being for other years than those sued for in the Farrington Case, that decision is not (as an adjudication) conclusive of the present case;" citing *Cromwell v. County of Sac*, 94 U. S. 351; *Nesbit v. Independent Dist.*, 144 U. S. 610, 12 Sup. Ct. 746; *Railroad Co. v. Alsbrook*, 146 U. S. 279, 13 Sup. Ct. 72; *Railroad Co. v. Missouri*, 152 U. S. 301, 14 Sup. Ct. 592. We adhere to that ruling.

Same.

The result is that in our opinion the capital stock of this bank is not exempt from taxation, but is not liable in the present case, because the legislature has made no provision for its assessment. The city, however, is entitled to collect its privilege taxes for six years next preceding the filing of the bill. The three-years limitation under the act of the extra session of 1895 (chapter 5, subsec. 7) has no application. That was a general revenue law of the state, and cannot operate as a bar to a claim by the city for its privilege taxes. Such claim is barred only to the extent that it falls within the general statute of limitations as to taxes found in chapter 24 of the Acts of 1885, under which all taxes are barred unless suit is brought "within six years from the first of January of the year for which such taxes accrued." The decree of the chancellor is reversed, and a decree will be entered in conformity with this opinion.

Limitations.

NOTES.

Taxation of Corporations—Effect of Exemption of Stock.—It is very generally held that an exemption of the shares of stock from taxation exempts the corporate property, franchises, capital stock.

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Cook on Stock and Stockholders (2d ed.), § 568; Cooley on Taxation (2d ed.) 213; Baltimore v. Baltimore, etc., R. Co., 6 Gill (Md.) 288; 48 Am. Dec. 531; State v. Wilson, 52 Md. 638; Frederick County v. Farmers', etc., Nat. Bank, 48 Ind. 117; Anne Arundel County v. Annapolis, etc., R. Co., 47 Md. 592; Richmond v. Richmond, etc., R. Co., 21 Gratt. (Va.) 604; Scotland County v. Missouri, etc., R. Co., 65 Mo. 123; Bank of Cape Fear v. Edwards, 5 Ired. (N. Car.) 516. See also Middlesex R. Co. v. Charleston, 8 Allen (Mass.) 330.

And in Foster v. Stevens, 63 Vt. 175, it was held that a statute providing for a direct tax upon the capital of a bank, is a tax upon the shares of stock held by its stockholders. See also Bugbee v. Stevens, 63 Vt. 185.

Same—Same—Contra.—In the case, however, of Wilmington, etc., R. Co. v. Reid, 64 N. Car. 226, it was held that an exemption of shares of stock does not exempt the corporate franchise from taxation. Raleigh, etc., R. Co. v. Reid, 64 N. Car. 155; and in State v. Petway, 2 Jones, Eq. (N. Car. 396, it was held that a charter provision that the shares of stock should be taxed a certain amount, did not prevent a tax on dividends.

Same—Same—License Tax.—In New Orleans v. New Orleans Canal, etc., Co., 32 La. Ann. 105, an exemption of bank stock from taxation was held not to preclude a license tax.

FARROW

v.

FIRST NAT. BANK.

(*Court of Appeals of Kentucky, Nov. 10, 1898.*)

Usury—Remedies.*—In an action on a promissory note by a national bank, where usury to a certain amount is pleaded under a state statute, and admitted, a judgment for plaintiff embracing the whole amount sued for is erroneous, the remedy given by the national banking act for forfeiture of all interest or recovery of double the usury not being exclusive.

APPEAL by defendant from Mason county circuit court. *Reversed.*

C. D. Newell, Cole & Son, and E. L. Worthington, for appellant.

Garrett S. Wall, for appellee.

WHITE, J. The appellee brought this action in the Mason circuit court against the appellant and one

*See note at end of case.

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Champe Farrow on a note executed to the appellant for \$671.65. The appellant filed answer, admitting the execution of the note, and pleaded that the note contained usury by being renewed every four months at 8 per cent. interest, from 1878 to 1879, except that a part of the same was for corn. The reply denied the renewals of any note, but said the note was for loaned money, giving dates and details, admitting that interest at 8 per cent. had been paid to some extent, and admitted that interest in excess of 6 per cent. had been collected to the amount of \$6.45. On motion of appellant this cause was transferred to equity, and referred to the master commissioner for proof as to the amount of usury. No proof was heard by the commissioner, and he reported, as the pleadings showed, that there was usury to the extent of \$6.45. Exceptions were filed to the report by appellant in November, 1895. In February, 1896, the appellee suggested the death of Champe Farrow, and asked that the case abate as to him, and the court overruled the exceptions to the commissioner's report. Appellee then filed exceptions to the report as to the allowance of any usury. The court sustained the exceptions of appellee, and rendered judgment for the full amount of the note sued on, without any deduction or diminution for usury; the court, in its judgment and opinion, deciding that, appellee being a national bank, the plea of usury was bad, and that, if any usury had been paid on the renewals, the amount could be recovered only under the national banking act, and that appellant could not plead the state usury laws as a defense. From this judgment the appeal is prosecuted.

We are of the opinion that the judgment rendered is erroneous in that it was not purged of usury. The answer pleads and the reply admits usury to the extent of \$6.45, and this amount should have been purged from the note. The court below was evidently of opinion that a plea of usury under the state statute was not good as against a national bank, and that the remedy given by the national banking act for forfeiture

Note

of all interest or recovery of double the usury was exclusive. In this, we think, he was mistaken. Appellant had a perfect right to either remedy, and by his answer elected to plead under the state statute, and, the usury being admitted by the reply, it was error to render judgment for this usurious interest. Appellant did not plead, under the federal statute, for a forfeiture, but under the state statute. The plea of usury was made a counterclaim by appellant, and on this issue, except as admitted by the reply, the burden was on him, and, having produced no proof, he was entitled to only the credit of admitted usury, \$6.45. The court did not err in refusing to continue the case, as appellant had had full and ample opportunity to present his proof either before the commissioner or by deposition. For the error indicated, the judgment is reversed, and cause remanded, with direction to render judgment for appellee for the amount of the note sued on, less \$6.45, the amount of usury admitted to be embraced therein, and for proceedings consistent herewith.

NOTE.

National Banks—Usury—State Laws Superseded.—Congress has, under the constitution, the power to fix the rate of interest which a national bank may take upon a loan, and to determine the penalty to be imposed for taking a greater rate. *Central Nat. Bank v. Pratt*, 115 Mass. 539, 15 Am. Rep. 138, 1 Nat. Bank Cas. 595. This power, when exercised, is exclusive of state legislation. *Central Nat. Bank v. Pratt*, *supra*; *Wiley v. Starbuck*, 44 Ind. 298, 1 Nat. Bank Cas. 436; *Higley v. First Nat. Bank*, 26 Ohio St. 75, 1 Nat. Bank Cas. 833. So the provisions of the national bank act imposing penalties upon national banks for taking usury, supersede the State laws upon that subject. *Davis v. Randall*, 115 Mass. 547, 15 Am. Rep. 146, Nat. Bank Cas. 600; *First Nat. Bank v. Childs*, 133 Mass. 348, 43 Am. Rep. 509, 3 Nat. Bank Cas. 469; *Farmers, etc., Nat. Bank v. Dearing*, 91 U. S. 29, 1 Nat. Bank Cas. 117; *First Nat. Bank v. Childs*, 130 Mass. 519, 39 Am. Rep. 474; *Hambright v. Cleveland Nat. Bank*, 3 Lea (U. S.) 40, 31 Am. Rep. 629, 2 Nat. Bank Cas. 419. Overruling *Steadman v. Redfield*, 8 Baxt. (Tenn.) 337. See also *First Nat. Bank v. Garlinghouse*, 22 Ohio St. 492, 10 Am. Rep. 751; *Merchants, etc., Nat. Bank v. Myers*, 74 N. Car. 514. *Contra*, see *First Nat. Bank v. Lamb*, 50 N. Y. 95, 10 Am. Rep. 438, overruled with *Farmer's Bank v. Hale*, 59 N. Y. 53, in *Hintermister v. First Nat. Bank*, 64 N. Y. 212, 1 Nat. Bank Cas. 741. Compare also *In re Wild*, 11 Blatchf. (U. S.) 243, 1 Nat. Bank Cas. 246.

First Nat. Bank of Brandon v. Briggs' Assignee

FIRST NAT. BANK OF BRANDON

v.

BRIGGS' ASSIGNEES.

(*Supreme Court of Vermont, July 21, 1898.*)

Knowledge of Officers—When not Notice to Bank.*—Knowledge acquired by the officers of a bank while not acting for it, but while acting for themselves, is not imputable to the bank.

Promissory Note—Insolvency of Maker—Fraudulent Conveyance.—It appeared that an accommodation note was executed by B. to his brother, plaintiff's cashier, for use at the plaintiff bank; that it was appropriated to the use and benefit of plaintiff by such cashier, with the knowledge and consent of the maker, after the latter had become insolvent; but that plaintiff, at such time, was not chargeable with notice of such insolvency. *Held*, that the assignees of the maker could not take advantage of such insolvency to defeat such appropriation.

EXCEPTIONS by defendants from Rutland county court. *Affirmed.*

Joel C. Baker and E. S. Marsh, for plaintiff.

Stewart & Wilds and Ormsbee & Briggs, for defendants.

Ross, C. J. 1. The first contention made on the referee's report relates to the liability of the insolvent's estate on claims 1 and 2. 1 is a note for \$7,000, and 2 a note for \$2,200, both payable Case Stated. to the plaintiff, and signed jointly by the insolvent and his brother, Frank E. Briggs. The plaintiff discounted both notes, and neither has ever been paid. At the time these notes were discounted, Frank E. Briggs was the cashier, and George, a director, of the plaintiff bank. There is nothing on the face of the notes to indicate the relation of the signers to each other. Both signers upon the notes appear to be joint makers or principals. In fact, the insolvent was surety for the other signer. This relation was not, in fact, known

*See notes at end of case.

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to any of the other officers of the plaintiff. The knowledge of the makers of these notes, although one was the cashier and the other a director of the plaintiff bank, in law, was not the knowledge of the plaintiff. Knowledge acquired by the officers or agents of a corporation while not acting for the corporation, but while acting for themselves, is not imputable to the corporation. The general rule which imputes the knowledge of the agent to his principal, and charges the latter with it, is based upon the principle that it is the duty of the agent to act for his principal upon such notice, or to communicate the information obtained by him to his principal, so as to enable the latter to act upon it. It does not apply when the agent acts for himself in his own interest, and adversely to that of the principal, because in such case he will, very likely, act for himself, rather than for his principal, and because he will not be likely to communicate to the principal a fact which he is interested to conceal, or under no duty to communicate. This applies to all cases where he is acting for himself with the corporation. Hence, if a corporation officer or agent acts avowedly for himself in a transaction with the corporation, he is regarded as a stranger to the corporation, dealing as if he had no official relations with it. This rule applies to controversies growing out of discount of bills and notes by banks for their own officers. In such cases the bank will not be affected by notice of any conditions upon which the note in question was given. 4 Thomp. Corp. §§ 5204-5208; Bank v. Gifford, 47 Iowa, 575; Bank v. Christopher, 40 N. J. Law, 435; Lyndon Mill Co. v. Lyndon L. & B. Inst., 63 Vt. 581, 22 Atl. 575. On these well-established principles, the plaintiff is not affected with imputable knowledge of the relation of the insolvent to the other signer of these notes. Unless knowledge of his relation to the other signer, on the facts found, is imputable to the plaintiff, it is not contended that the facts found by the referee in regard to the extension of the time of the payment of these notes, if found from

Knowledge of Officers when not Notice to Bank.

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competent testimony,—in regard to which no decision is made,—discharge the insolvent or his estate from liability to pay them. These notes, therefore, are proper charges upon the estate of the insolvent. Claims 3, 4, and 5 are not contested here.

2. Claim 6 is a note for \$5,000 executed by the insolvent January 17, 1891, payable to the order of F. E. Briggs, at the bank of the plaintiff, one month after date. It is found that this was an accommodation note, executed by the insolvent to his brother, the cashier of the plaintiff, for use at the plaintiff bank. It was made without consideration of security. The referee reports that it bears certain indorsments and memoranda upon its back, in the handwriting of Frank E. Briggs. It bears the number of another note executed before that time by F. E. Briggs to the plaintiff, for \$2,000. There was no evidence before the referee that this note was ever discounted by the plaintiff, nor that the bank ever paid any money or other consideration for it. It was not entered upon the records or books of the bank until December 30, 1892, when an inventory was made of the notes belonging to the bank. It was entered upon this inventory. February 1st, following, Frank E. Briggs ceased to be cashier, and George Briggs became cashier for three months. At the time of making this inventory, Frank E. Briggs was short in his various accounts with the plaintiff to the amount of \$20,000. A portion of the shortage was in his loan account. If this note is a part of his loan account, there is still a shortage of nearly \$1,000. When the inventory was made, both Frank E. and George were in fact insolvent, and filed petitions to be adjudged insolvents in the January following. They were both present at the making of the inventory. It was found that Frank E., on that day, before the inventory was made, indorsed the note, and placed it among the notes belonging to the plaintiff, to make up, in part, the shortage in his loan account. When the note was found among the notes of the plaintiff in making this inventory, the insolvent

Promissory Note—
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Conveyance.

First Nat. Bank of Brandon *v.* Briggs' Assignee

expressed surprised at finding this note among the notes of the bank, and asked what it meant. Frank thereupon said that it belonged to him to pay. Thereupon the insolvent wrote across the back of the note the words, "This belongs to me to pay," and Frank E. Briggs signed it by placing his initials, "F. E. B.," thereunder. Thereafter this note remained among the notes of the bank, and was passed over by Frank E. as such, to the insolvent, when he became cashier, February 1, 1893, and by the insolvent passed over to his successor when he ceased to be cashier, May 1, 1893. The referee finds that this note, with others, was signed by the insolvent with the understanding on his part that it was to be used by Frank E. at the plaintiff bank, and to represent money to be there borrowed by him. There is no finding by the referee that either the insolvent or his brother, Frank E., was insolvent when the latter executed and delivered to the former this note, January 17, 1891. From that time until December 30, 1892, Frank E. held it in his hands, with the right to use it in his dealings with the plaintiff; and on the latter date he did use it as an asset which he held, to reduce the shortage in his loan account with the plaintiff. This was done with the knowledge of the insolvent, and without objection from him. It then became an asset of the plaintiff, with the knowledge of the insolvent. It is not found that the plaintiff then believed or had reason to believe that either the maker or indorser of this note was insolvent. The note was not a conveyance of property by either. Hence the assignees of George Briggs cannot take advantage of the fact of insolvency to defeat the appropriation of the note then made by Frank E. with the acquiescence of the insolvent, to the use and benefit of the plaintiff. On these views, this note is a proper charge against the estate of the insolvent.

The referee has submitted a question as to the time to which interest should be computed on some of these claims. We have not considered that question, inasmuch as we understand that the court of insolvency

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will adjust the computation of interest on all claims provided against the estate so that all may share ratably in the estate. Judgment affirmed and ordered to be certified to the court of insolvency.

NOTES.

Knowledge of Officers—When Not Notice to Corporation.—See *Seaverns et al. v. Presbyterian Hospital* (Ill.), 8 Am. & Eng. Corp. Cas., N. S., 468, and *note*, p. 478.

An exception to the application of the general rule that notice to an agent is notice to the principal arises in case of such conduct by the agent as raises a clear presumption that he would not communicate the fact in controversy, as where the agent acts for himself in his own interest and adversely to that of the principal.

England.—*Kennedy v. Green*, 3 Myl. & K. 699; *In re European Bank*, L. R. 5 Ch. 358; *In re Marseilles Extension R. Co.*, L. R. 7 Ch. 161; *Cave v. Cave*, 15 Ch. Div. 639.

United States.—*Third Nat. Bank v. Harrison*, 10 Fed. Rep. 243; *Thomson-Houston Electric Co. v. Capitol Electric Co.*, 65 Fed. Rep. 341.

Alabama.—*Frenkel v. Hudson*, 82 Ala. 158, 60 Am. Rep. 736.

Iowa.—*Davenport First National Bank v. Gifford*, 47 Iowa 575.

Kansas.—*Wickersham v. Chicago Zinc Co.*, 18 Kan. 481, 26 Am. Rep. 784.

Kentucky.—*Lyne v. Kentucky Bank*, 5 J. J. Marsh. (Ky.) 545.

Massachusetts.—*Frost v. Belmont*, 6 Allen (Mass.) 163; *Washing-ton Bank v. Lewis*, 22 Pick. (Mass.) 24; *Commercial Bank v. Cunningham*, 24 Pick. (Mass.) 270, 35 Am. Dec. 322; *Atlantic Nat. Bank v. Harris*, 118 Mass. 147; *National Security Bank v. Cushman*, 121 Mass. 490; *Loring v. Brodie*, 134 Mass. 453; *Dillaway v. Butler*, 135 Mass. 479; *Innerarity v. Merchants' Nat. Bank*, 139 Mass. 332, 52 Am. Rep. 710; *Allen v. South Boston R. Co.*, 150 Mass. 206, 15 Am. St. Rep. 185.

Michigan.—*Stevenson v. Bay City*, 26 Mich. 44; *Gallery v. National Exch. Bank*, 41 Mich. 169, 32 Am. Rep. 149.

Missouri.—*Hickman v. Green*, 123 Mo. 165; *Merchants' Nat. Bank v. Lovitt*, 114 Mo. 525.

New Jersey.—*Stratton v. Allen*, 16 N. J. Eq. 229; *Barnes v. Trenton Gas Light Co.*, 27 N. J. Eq. 33; *De Kay v. Hackensack Water Co.*, 38 N. J. Eq. 158; *Hightstown First Nat. Bank v. Christopher*, 40 N. J. L. 435.

Texas.—*Harrington v. McFarland*, 1 Tex. Civ. App. 289.

Wisconsin.—*In re Plankington Bank*, 87 Wis. 378.

• See also *Custer v. Tompkins County Bank*, 9 Pa. St. 27; *Terrell v. Mobile Branch Bank*, 12 Ala. 502.

Illustrations.—One of the recent cases on this point is *Dillaway v. Butler*, 135 Mass. 479. A, to whom B was indebted, advised C to lend money to B on the security of a mortgage of personal property, and acted as C's agent in the transaction. With the money thus obtained B paid A the debt he owed him. Both A and B acted in fraud

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of the Gen. Stat. c. 118, §§ 89, 91; but C had no knowledge of the fraud. It was held that the knowledge of A was not in law imputable to C, although A had acted for C in the negotiation. See also *Innerarity v. Merchants' Nat Bank*, 139 Mass. 332, 52 Am. Rep. 710.

Where an officer of a corporation in his private capacity sells land to the corporation, he must be held not to represent them in the transaction so as to charge the corporation with the knowledge he may possess of facts derogatory to the title of the land and which he has not communicated to them. As such he is a stranger to the corporation. *Barnes v. Trenton Gas Light Co.*, 27 N. J. Eq. 33.

Reason of the Rule as to Agents Acting in Their Own Interest.—In *Frenkel v. Hudson*, 82 Ala. 162, 60 Am. Rep. 736, SOMERVILLE, J., in commenting upon the above doctrine, says: "It is based upon the principle that it is the duty of the agent to act for his principal upon such notice, or to communicate the information obtained by him to his principal, so as to enable the latter to act on it. It has no application, however, to a case where the agent acts for himself, in his own interest, and adversely to that of the principal. His adversary character and antagonistic interests take him out of the operation of the general rule, for two reasons: first, that he will very likely, in such case, act for himself rather than for his principal; and secondly, he will not be likely to communicate to the principal a fact which he is interested in concealing. It would be both unjust and unreasonable to impute notice by mere construction under such circumstances, and such is the established rule of law on this subject."

In *Allen v. South Boston R. Co.*, 150 Mass. 206, 15 Am. St. Rep. 185, the rule of the law as stated above was held to be the correct one, but the reason of the rule was doubted. In that case the court said: "It is sometimes said that it cannot be presumed that an agent will communicate to his principal acts of fraud which he has committed on his own account in transacting the business of his principal, and that the doctrine of imputed knowledge rests upon a presumption that an agent will communicate to his principal whatever he knows concerning the business he is engaged in transacting as agent. It may be doubted whether the rule and the exception rest on any such reasons. It has been suggested that the true reason for the exception is that an independent fraud committed by an agent on his own account is beyond the scope of his employment, and therefore knowledge of it, as matter of law, cannot be imputed to the principal, and the principal cannot be held responsible for it. On this view, such a fraud bears some analogy to a tort wilfully committed by a servant for his own purposes, and not as a means of performing the business intrusted to him by his master. Whatever the reason may be, the exception is well established."

Merchants' and Planters' Bank v. Penland

MERCHANTS' AND PLANTERS' BANK

v.

PENLAND.

(*Supreme Court of Tennessee, Nov. 2, 1898.*)

Notice to Cashier—When Notice to Bank.*—Where the cashier of a bank has been given full authority to make discounts, it cannot be contended in behalf of the bank that notice to the cashier is not notice to the bank in the discounting of notes.

Promissory Notes—Bona Fide Purchasers.—The mere fact that the holder of a promissory note knew that it was given for land, and that there was a lien on the land for unpaid purchase money, and that there might thereafter occur a partial failure of consideration for the note by an enforcement of the lien, will not render such holder subject to all the equities that may thereafter arise between the original parties to the note; nor prevent him from being a *bona fide* purchaser.

APPEAL by both parties from Cocke county chancery court. *Reversed, and decree directed for complainant.*

H. N. Cate, for complainant.

W. J. McSween, for defendant.

WILKES, J. This is an action to recover against defendant, Penland, two notes, for \$66.66 each. The notes were given by Penland to the Newport Development Company, and by it indorsed, and complainant claims to be an innocent holder for value of the same. Penland answered the bill, and filed a cross bill, in which he seeks to avoid the notes, and rescind the contract out of which they arose, upon the ground that they were obtained by the fraudulent representations of the bank and development company; that the lot for which they were given was free of all incumbrance and liens; that the bank had notice of the liens held by the parties who sold to the development com-

*See note at end of case.

Merchants' and Planters' Bank v. Penland

pany, and took the notes subject to the equities of Penland against the development company. The court of chancery appeals find that the bank had notice of the lien of the Newport Real-Estate Company upon this lot, and was affected, in consequence, with all Penland's equities against that part of the lot purchased from that company, but that a portion of the lot was purchased from one Denton, and the bank did not have such notice of a lien in favor of Denton as would affect it. Hence that court canceled one note, and entered a credit on the other, and gave judgment against Penland for the balance, the idea being to release Penland from liability for so much of the lot as was bought from the Newport Company, but hold him for so much as was bought from Denton by the development company. Both parties have appealed, and in this court it is insisted for complainant that Penland should be held for the whole of both notes, and for defendant that he should be released from both.

Disposing of complainant's assignments first, it is insisted that the court of chancery appeals erred in holding that notice to the cashier of complainant bank was notice to the bank, and the contention is that the bank would only be affected by notice to one of its discount committee or directors. The court of chancery appeals finds as a fact that the cashier of this bank was allowed full liberty, and the widest authority, to make loans and discount paper, and that the discount committee and board of directors rarely met, and did not look after the discounts, as was their duty. Having given full authority to the cashier to make discounts, the bank cannot be heard to say that notice to him was not notice to the bank in the discounting of notes.

The next assignment is that Penland knew of the defects in his title, and took warranty deed to protect himself therefrom, and hence it is no defense to him that the bank had notice of these defects and liens. Nor can it avail him anything that the development company afterwards became insolvent. In the same con-

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nection, it is said that Penland, having taken a deed with covenants of warranty, has no equitable defense against the note, unless he show fraud, but his only protection is the covenants in his deed. The court of chancery appeals find that, while fraud is charged in the cross bill, it is not shown in the proof. That court reports also, that the fact of the insolvency of the development company is set up in the answer, and that the cross bill, in effect, charges that Penland has been evicted, and these facts are proven; but they are not alleged to have been in existence when the note was received by the bank.

Upon this statement of facts, the question recurs, is the bank a *bona fide* holder and innocent purchaser of the notes or is it affected by the equities between the original parties? It took the notes before maturity, as collateral, it is true, but as security for money then advanced. If there were nothing else in the case, this would make it an innocent holder. Bank v. Stockell, 92 Tenn. 256, 21 S. W. 523. Does the mere fact that it knew the notes were given for land, and that there was a lien on the land for unpaid purchase money, and that there might thereafter occur a partial failure of consideration by an enforcement of the lien, render the bank subject to all the equities that might thereafter arise between the original parties? The court of chancery appeals was of opinion it did, and they cite Ingram v. Morgan, 4 Humph. 66, and Ferriss v. Tavel, 87 Tenn. 386, 11 S. W. 93, in support of their holding. But in both of these cases the holder of the notes in controversy took them to secure a pre-existing debt, and could not be called an innocent holder. And the cases referred to in 4 Am. & Eng. Enc. Law (2d. Ed.) p. 198, are based upon a similar state of facts. But this partial failure of consideration cannot be asserted against a *bona fide* holder for value, for such a holder takes the title free from the equities between the original parties. 4 Am. & Eng. Enc. Law (2d. Ed.) p. 198; Bank v. Stockell, 92 Tenn. 256, 21 S. W. 523. In addition, it does not

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appear that these equities existed between the original parties at the time these notes were indorsed to the bank. The purchaser, Penland, had not then been evicted, and, so far as the record shows, the insolvency of the company had not then been made manifest. The defense, in order to be set up against the indorsee, must be an equity that existed when the indorsement was made. *Bearden v. Moses*, 7 Lea, 459; *Alderson v. Cheatham*, 10 Yerg. 304. We are of opinion that, upon the facts as found by the court of chancery appeals, the bank was the *bona fide* innocent holder of these notes, and entitled to enforce their collection free of any equities arising between the original parties after it received them, and the court should have so decreed. The decree of the court of chancery appeals is reversed, and judgment will be entered in favor of complainant against defendant for both notes and interest, and 10 per cent. attorney's fees, as provided in the notes, and all costs.

NOTE.

Notice to Cashier as Notice to Bank.—Notice to a cashier as to all matters within the sphere of his business is notice to the bank. *Duncan v. Jaudon*, 15 Wall. (U. S.) 165; *Huntsville Branch Bank v. Steele*, 10 Ala. 915; *St. Mary's Bank v. Mumford*, 6 Ga. 49; *America Bank v. McNeil*, 10 Bush (Ky.) 54; *Fall River Union Bank v. Sturtevant*, 12 Cush. (Mass.) 375; *Trenton Banking Co. v. Woodruff*, 2 N. J. Eq. 118; *New Hope, etc., Bridge Co. v. Phenix Bank*, 3 N. Y. 156; *Harrisburg Bank v. Tyler*, 3 W. & S. (Pa.) 373; *Birmingham Trust, etc., Co. v. Louisiana Nat. Bank*, 99 Ala. 379.

Notice to the cashier who lends the bank's money upon the security of stocks, that the stock pledged is held in trust, will bind the bank. *Gaston v. American Exch. Nat. Bank*, 29 N. J. Eq. 98.

GILL

v.

FIRST NAT. BANK.

(*Court of Civil Appeals of Texas, Nov. 11, 1898.*)

Existence of Partnership.—Where the partnership of plaintiff and a third party is set up as a defense to an action, and is not denied under oath, its existence must be held established.

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Knowledge of One Partner Notice to All.—In regard to partnership business, the knowledge of one partner is imputable to the other.

Banks—Ultra Vires—Estoppel.*—Where a national bank has acted as a partner in the sale of horses, and has shared in the profits of such sale, it is estopped from denying its power to enter into such partnership, when attempting to enforce the collection of the notes given by the purchaser for the property.

Negotiability of Notes.—The fact that a promissory note is payable "on or before" a certain date does not affect its negotiability.

Pleading Corporate Existence.*—The allegation that plaintiff is a national banking corporation, incorporated under and by virtue of the national banking laws, is a substantial compliance with the article of the statute requiring an allegation that it is "duly incorporated."

APPEAL by defendant from Dallas county court.
Reversed.

Henry & Crawford, for appellant.

T. L. Camp, for appellee.

RAINEY, J. The appellee bank brought this suit against appellant, Gill, to recover upon several notes executed by said Gill, payable to the order of Jesse Harris, who indorsed and transferred same to said bank. The appellant admitted the execution of the notes, but alleged that the execution of same was procured by fraud, of which the bank had notice when same were transferred to it. The case was submitted to the court without a jury, and judgment rendered for appellee, from which this appeal is taken.

Case Stated.

We think the court erred in rendering judgment for the appellee, as the same was not warranted, under the state of the pleadings and evidence. The defendant in his answer alleged, in substance, that said notes were executed, for the purchase price of certain horses sold by Harris to the appellant; that, at the time of the sale of said horses and the execution of said notes, said Harris fraudulently represented that said horses were of the purest strain of Clydesdale, that they had the best known pedigree, and that all of them were eligible to registration in the

Existence of Partnership.

*See note at end of cases.

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Clydesdale Association of America ; and that he relied upon said representations, but that said representations were false ; and that said horses were worthless stock. It was further alleged that, at the time of the sale of said horses, said Harris and the said plaintiff were partners, and were acting together in the sale of same, and shared in the profits arising from the said transaction. The defendant having alleged the partnership of Harris and the plaintiff, and same not having been denied under oath, under our statute the court should

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have considered the partnership as established. The partnership being established by reason of the failure to deny under oath the allegations of partnership, it follows that

if Harris perpetrated a fraud in procuring said notes by false representations the bank was chargeable with the notice of said fraud, whether it had actual knowledge thereof or not. In the case of Reed v. Brewer, 37 S. W. 418, the supreme court held that where the defendant alleges that a partnership existed between the plaintiff and a third party, the existence of such a partnership would be considered as established, unless the existence of the same is denied by the plaintiff under oath. In the case of Bank v. Oliver, 41 S. W. 414, this court held to the contrary. This ruling being in conflict with the ruling of the supreme court, as above shown, the same is overruled. When we made that ruling the case of Reed v. Brewer, *supra*, had recently been decided, and we were not aware of its existence.

It is insisted, however, by appellee, that it could not legally enter into such a partnership, and that the allegations of partnership in defendant's answer

Banks—Ultra Vires
—Estoppel.

should not be considered of any force or effect. We cannot concur in this proposition.

Whether such partnership would be legal or not, it is unnecessary for us to decide. If such should be conceded, we are of the opinion that if the bank was acting in connection with Harris in the sale of the horses, and sharing in the profits arising therefrom, it is estopped from denying its power to contract such

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relation, when attempting to reap the benefit arising therefrom by enforcing the collection of the notes through the courts.

The terms of the note, that it was payable "on or before" a certain date, did not affect its negotiability. *Buchanan v. Wren* (Tex. Civ. App.) 30 S. W. 1077. Negotiability of Notes.

The allegation that plaintiff is a national banking corporation, incorporated under and by virtue of the national banking laws, is a substantial compliance with the article of the statute requiring an allegation that it is "duly incorporated." The judgment is reversed, and the cause remanded. Pleading Corporate Existence.

NOTE.

Executed Contracts—Ultra Vires—Corporations Estopped.—When a corporation has entered into a contract and actually received the consideration, it is held that it is estopped to set up the defence of *ultra vires*. *Hazelhurst v. Savannah, etc., R. Co.*, 43 Ga. 54; *White v. Franklin Bank*, 22 Pick. 181; *Parrish v. Wheeler*, 22 N. Y. 494; *Bissell v. Michigan, etc., R. Co.*, 22 N. Y. 258; *Southern Life Ins. Co. v. Lanier*, 5 Fla. 110; *McCluer v. Manchester, etc., R. Co.*, 13 Gray, 124; *Chapman v. M. R., etc., R. Co.*, 6 Ohio St. 137; *Hale v. Mutual Fire Ins. Co.*, 32 N. H. 297; *Railroad Co. v. Howard*, 7 Wall. 413; *Zabriskie v. C. & C., etc., R. Co.*, 23 How. (U. S.) 381; *Racine, etc., R. R. Co. v. Farmer's L. & T. Co.*, 49 Ill. 346; *Chicago Bld. Ass'n v. Crowell*, 65 Ill. 454; *City of St. Louis v. St. Louis Gas Light Co.*, 70 Mo. 69; *Newsburg Petroleum Co. v. Weare*, 27 Ohio St. 343; *Oil Creek & Allegheny River R. Co. v. Penna Trans. Co.*, 73 Pa. St. 160; *Peoria & S. R. Co. v. Thompson*, 7 Am. & Eng. R. Cas. 101; *Chaffee v. Rutland, etc., R. Co.*, 16 Am. & Eng. R. Cas. 408; *Nashua & L. R. Co. v. Boston & L. R. Co.*, 16 Am. & Eng. R. Cas. 448; *Woodruff v. Erie R. Co. et al.*, 16 Am. & Eng. R. Cas. 501; *Keyser v. Hitz*, 1 Am. & Eng. Corp. Cas. 231.

See also, 1 Am. & Eng. Corp. Cas., N. S., *note*, 406 *et seq.*

National Banks—Pleading Corporate Existence.—An allegation in the complaint in an action by a bank that "the plaintiff is a national bank, doing business under the act of Congress" in effect avers that it is a corporation. *Joseph Holmes Fuel & Feed Co. et al. v. Commercial Nat. Bank of Denver* (Col.), 6 Am. & Eng. Corp. Cas., N. S., 244.

Willett v. Farmers' Sav. Bank of Victor

WILLETT

v.

FARMERS' SAV. BANK OF VICTOR.

(*Supreme Court of Iowa, Dec. 17, 1898.*)

Savings Banks—Contracts—Ultra Vires.*—It is an *ultra vires* transaction on the part of a savings bank, and not even within its apparent powers, to enter into a contract to attend a public sale for the purpose of keeping an account of the sales and taking promissory notes from purchasers, with approved security; and the principal under such contract cannot recover for negligence on the part of the bank in carrying it out.

APPEAL by plaintiff from Iowa county district court.
Affirmed.

D. H. Wilson, for appellant.

Hedges & Rumple, for appellee.

GIVEN, J. 1. The petition is quite lengthy, but the following will be a sufficient statement of it for the purposes of the question presented on this appeal: Plaintiff alleges that defendant is a corporation organized under the laws of this state as a savings bank, and is doing business as such; that about the 1st day of February, 1896, plaintiff employed the defendant, for a consideration, to attend a public sale to be held by plaintiff, as his agent, to keep an account of the sales, to take promissory notes from purchasers, with approved security, when the purchase exceeded five dollars, and to retain the notes, and collect the same when due; that defendant, through its duly-authorized agents and servants, attended said sales, kept the accounts, and took the notes, and that plaintiff, relying on them, gave the matter no further consideration; that one James Doonen was a purchaser to the amount of \$161.80; that defendant's agent prepared a note for him to ex-

*See note at end of case.

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ecute, and gave it to him to be signed by himself and surety; that James Doonen returned the note to defendant's agent, signed by himself, and purporting to have been signed by Thomas Doonen, and defendant's agent accepted and approved the same; that the name Thomas Doonen to said note was a forgery; that no such man lived in the community; and that, as defendant well knew, James Doonen was not financially responsible. Plaintiff alleges that the defendant, through its agents and employees, was careless and negligent in permitting James Doonen to take said note to have the same signed by a surety, and in receiving and approving the note, with the knowledge of James Doonen's financial inability, and without inquiring as to Thomas Doonen; that James Doonen has disposed of all his property, and absconded, wherefore it would be useless to bring suit against him; and that because of defendant's negligence plaintiff is entitled to recover the sum of said note and interest from the defendant. The ground of the demurrer is that the petition shows on its face that the defendant is a savings bank incorporated under the laws of Iowa, "and the defendant, under the laws of Iowa, has no authority to enter into any contract or obligation for the performance of any of the acts stated and set forth in said pleadings."

2. Briefly stated, the basis of plaintiff's demand is that, for a consideration to be paid, the defendant savings bank agreed that in accepting and approving the sale notes it would exercise care to see that the notes were well secured, and that in accepting the Doonen note it failed to exercise care, and acted negligently. The petition shows that defendant was incorporated as a savings bank under the laws of Iowa, and under repeated decisions it could only exercise the power conferred by those laws. The contention being whether the defendant had power to make the agreement set up in the petition, we turn to the laws of Iowa for the answer. The defendant was incorporated under the laws as found in chapter 6a. p. 449, and following, McClain's Code, under the head "Sav-

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ings Banks." Section 1788 authorizes the incorporation of savings banks "for the purpose of receiving on deposit the savings and funds of others, and preserving and safely keeping the same, and paying interest or dividends thereon." Section 1789 provides that they "shall have power to transact business of such institutions." Section 1792, under "Enumeration of Powers," provides that they shall have power: "First. To sue and be sued in any court. Second. To make and use a common seal, and to alter the same at pleasure. Third. To purchase, hold, sell, convey, and release from trust or mortgage, such real and personal estate as hereinafter provided for in this act. Fourth. To appoint such officers, agents, and servants as the business of the corporation shall require; to define their powers, prescribe their duties, and fix their compensation: and to require of them such security as may be thought proper for the fulfillment of their duties. Fifth. To loan and invest the funds of the corporation, to receive deposits of money, or to loan and invest the same as hereinafter provided, and to repay such deposits without interest, or with such interest as the by-laws or the constitution may provide. Sixth. To make by-laws, not inconsistent with the laws of this state, for the organization of the company, and the management of its property, the regulation of its affairs, the condition on which deposits will be received, the time and manner of dividing the profits and of paying interest on deposits, and for carrying on all kinds of business within the objects and purposes of the company." Section 1794 authorizes such banks to "receive on deposit all such sums of money as shall, from time to time, be offered by tradesmen, merchants, laborers, servants, minors and others." Section 1796 authorizes the directors or trustees to invest the funds belonging to the bank, all moneys deposited therein, and all the gains or profits thereof, "only as follows," namely, bonds, etc., of the United States and of this state, stock bonds or warrants of any city, town, county, village, or school district of this state, issued pursuant to

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any law of the state, and in notes secured by first mortgage or deed of trust upon real estate in this state; also to discount, purchase, sell, and make loans upon commercial paper, notes, bills of exchange, drafts, or any other personal or public security. Section 1797 makes it lawful for such banks to purchase, hold, and convey the real estate in which the business is carried on, and such as shall have been purchased at foreclosure or execution sales on mortgages or judgments owned by the bank. Other powers conferred relate to the manner of organizing. As we view it, there is not in all these sections an expression that can be construed as authorizing savings banks to make such an agreement as that set up in the petition. If they may agree to furnish clerks for public sales to keep the account of the sales and to take notes with good security, and to be responsible for the exercise of care on the part of such clerks, they may contract to furnish like services to merchants, manufacturers, common carriers, and others, and to assume like obligations. Such an obligation is somewhat in the nature of a security. In *Lucas v. Transfer Co.*, 70 Iowa, 542, 30 N. W. 772, we held that the defendant, incorporated for "general freight and transfer business," had no power to make a contract whereby it became surety for another. The alleged agreement is not within the powers conferred, and is contrary to the spirit and purpose of the statute authorizing savings banks. This conclusion finds support in the case of *Lucas v. Transfer Co.*, *supra*.

3. In *Lucas v. Transfer Co.*, *supra*, it is said: "Where the officers of a corporation make a contract with third parties in regard to matters apparently within their corporate powers, but which, upon the proof of extrinsic facts (of which such parties had no notice), lies beyond their powers, the corporation must be held, unless it may avoid liability by taking timely steps to prevent loss or damage to such third parties; for in such cases the third party is innocent, and the corporation or stockholders less innocent for having selected officers not worthy of the trust reposed in them." The

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matter of this contract was not, apparently, within the corporate powers of a savings bank. Plaintiff would not have thought of going to a savings bank to furnish him help on his farm under an agreement that the help should exercise care in the performance of the work. The illustrations given in that opinion show that the rule does not apply in this. The demurrer was properly sustained, and the judgment is therefore affirmed.

NOTES.

Ultra Vires Contracts—When and by Whom the Plea of Ultra Vires Can and Cannot be Raised.—It is now well settled that a corporation cannot avail itself of the defense of *ultra vires* when a contract has been in good faith fully performed by the other party, and the corporation has had the full benefit of the performance of the contract. The same rule holds *e converso*. If the other party has had the benefit of a contract, fully performed by the corporation, he will not be heard to object that the contract and performance were not within the legitimate powers of the corporation. *Whitney Arms Co. v. Barlow*, 63 N. Y. 62; *In re National P. B. Building Society*, L. R., 5 Ch. App. 309; *Rutland & B. R. Co. v. Proctor*, 29 Vt. 93; *Farmers' & Millers' Bank v. D. & M. R. Co.*, 17 Wis. 372.

If an action cannot be brought directly upon an agreement because it is *ultra vires*, either equity will grant relief or an action in some other form will prevail.

Where no fraud has been committed or intended, a corporation which has enjoyed the benefit of a contract cannot plead that it was *ultra vires*. *Town Co. v. Morris*, 43 Kan. 282.

A contract of a corporation is presumed to be *infra vires* until the contrary is made to appear. *Southern Express Co. v. Western N. C. R. Co.*, 99 U. S. 191, 199.

The courts will, as a general rule, presume that contracts made by a corporation, and which appear to be designed to promote its legitimate and profitable operation, are within the limits of its powers, and, if their validity be assailed, will require the assailant to assume the burden of demonstrating that fact. *Ellerman v. Chicago Junction Railways & Stock-Yards Co.*, 49 N. J. Eq. 217, 35 Am. & Eng. Corp. Cas. 388.

An unauthorized executory contract made by a corporation cannot be enforced, yet, where a contract has been executed and the corporation has received the benefit therefrom, the law interposes an estoppel, and will not permit the corporation to question the validity of the contract. *Rich v. Bank*, 7 Neb. 201; *White v. Bank*, 39 Mass. 181; *Alleghany City v. McCluran*, 14 Pa. St. 81; *Durham v. Mining Co.*, 22 Kan. 232.

Where a contract results to the benefit of a corporation, very slight evidence of acquiescence or application will be sufficient to give it validity. *Getty v. Milling Co.*, 40 Kan. 281.

Where a want of power is pleaded *in favor* of a corporation, to

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defeat the payment of the consideration for benefits which the corporation has received and enjoyed, the courts will go as far as is consistent with law to uphold the contracts for the purpose of maintaining justice, equity, and good conscience; but where the want of power is pleaded *against* a corporation to prevent wrong, the corporation will be held to the strictest rules of law. *Tippecanoe County v. Lafayette M. & B. R. Co.*, 50 Ind. 85.

One who has received from a corporation the full consideration of his agreement to pay money cannot avail himself of the objection that the contract was *ultra vires*. *Chicago & Atl. R. Co. v. Derkes*, 103 Ind. 520.

In this case the defendants in error, in consideration of the construction of a railroad to a certain county and town, obligated themselves in a sum sufficient to pay for the right of way across the county; and after the road was constructed as agreed, claimed a want or inadequacy of consideration for the contract, and also sought to evade the same on the ground that it was *ultra vires* the corporation, but the court held them to the fulfillment of their agreement.

In *Doyle v. Mizner*, 42 Mich. 332, it was said that the rule that one who recognizes an association as a corporation by dealing with it as such is estopped from disputing its incorporation originates in equitable principles and rests on the ground that the act of recognition creates relations and encourages conduct which there may be difficulty in undoing; but it does not apply where no new rights have intervened, and the recognition has itself been brought about by a fraudulent dealing carried on for the purpose of entrapping a party into the act from which the recognition is inferred.

If a corporation, in excess of the powers conferred by its charter, receives a sum of money upon condition that it will return it if an additional sum is not raised within a given time, and the condition is broken, an action may be maintained against the corporation on an implied promise to return the money. And it is no defense to the action that the corporation had no charter power to enter into the contract named. *Morville v. American Tract Society*, 123 Mass. 129.

In this case the plaintiff had paid \$5000 to the defendant society under an agreement with the treasurer thereof that it should be repaid to him in case the society should not be allowed to retain its catholic condition, and unless \$50,000 were raised within five years for evangelization purposes. A receipt for the money signed by the treasurer, and reciting that agreement, was given to the plaintiff. There was a failure of one of the conditions named, but the society refused to pay the money back to the plaintiff, whereupon suit was brought, and defended on the ground, principally, that the contract was not within the chartered powers of the society and hence could not be enforced against it. But the court held, as stated, that the corporation was liable for the money received.

In *Ohio Life Ins. & T. Co. v. Merchants' Ins. & T. Co.*, 11 Humph. (Tenn.) 1, the defendant, the Merchants' Ins. & T. Co., was incorporated with power to make insurances, to accept and execute trusts, to loan its capital stock or invest it in other stocks, to hold real estate for certain purposes, to establish agencies, and to do all other acts necessary to carry out these objects. Another statute (Laws 1827, ch. 85) declared that no corporation or individual shall estab-

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lish any office for discount or deposit, or issue any bills, promissory notes, or other instrument of writing, with intent to put into operation any banking institution. The company named dealt exclusively in exchanges, not in aid of its legitimate objects, but as an independent pursuit, and in the course of such dealing became indebted to the Ohio Life Ins. & T. Co. The Ohio company, however, had no knowledge that the specific acts of dealing in exchange to which it was a party were in the unlawful pursuit of banking on the part of the defendant company. *Held*, that the defendant company had power to deal in exchange so far as it was necessary to carry on the business of insurance, but that it had no power to deal in exchange except in aid of that business without an express grant from the legislature to do so, and its actual dealings in exchange were otherwise unauthorized and void; but that the defendant, having the power to deal in exchange for certain purposes, and the plaintiff not having knowledge of the unlawful conduct of the defendant, the latter should not be permitted to derive a profit from the violation of the statute, and therefore it should be decreed to pay debts contracted in furtherance of its unlawful pursuit.

The fact that the contracts made with the Ohio company were made in another state was held by the court not to invalidate the same on that account, on the ground that corporations are recognized in the comity of states, and that corporations chartered in one state may make in another all contracts which are within the sphere of its powers in the state where organized, and which are not prohibited by the law of the state where the contracts are actually entered into.

Where two corporations, without legal authority, unite their business for the purpose of promoting their interests, enter into contract accordingly, and receive the benefit of those contracts, they cannot, when liabilities arise thereon, or accrue to them in the operation of their consolidated interests, interpose as a shield from responsibility the violation of their own charters in entering into such a combination. *Bissell v. Michigan Southern & N. I. R. Co.*, 22 N. Y. 258, *affirming* 29 Barb. 602.

The facts in this case may be briefly stated thus: Two railroad companies, one chartered in Michigan and the other in Indiana, were authorized to construct and operate a railroad within their respective states; they united their business and operated their own roads, and also a third road in the state of Illinois. In an action to recover damages brought by a passenger who was injured in a collision in Illinois through the carelessness and neglect of the defendant, the latter set up as a defense that the contract to carry was *ultra vires*, as it was the outcome of the unlawful combination of the companies; but the court determined that the defendants were jointly liable. This case was distinguished in *Lucas v. White Line Transfer Co.*, 70 Iowa 548, and in *Nassau Bank v. Jones*, 95 N. Y. 123.

It is not *ultra vires* for a railroad company, by its directors, to contract to issue to contractors for the completion of the road preferred stock in the company in payment for work to be done, and to agree that the majority of the directors shall be the holders of a certain number of shares of said preferred stock; provided the number of shares agreed to be issued does not make the whole amount of shares greater than the capital stock authorized by the charter. *WARNER, J.*, dissenting. *Hazlehurst v. Savannah G. & N. A. R. Co.*, 43 Ga. 13.

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Where constitutional restrictions affect the manner and not the fact of the exercise of powers by a corporation, municipal or otherwise, acts not within the scope of the express powers of the corporation may not be *ultra vires*, but *aliter*, if the exercise of the power itself is prohibited. *McPherson v. Foster Bros.*, 43 Iowa 48.

The doctrine of *ultra vires* ought to be reasonably, and not unreasonably, understood and applied; and whatever may be fairly regarded as incidental to and consequential upon those things which are authorized by the charter of the company ought not, unless expressly prohibited, to be held, by judicial construction, to be *ultra vires*. *Ellerman v. Chicago Junction Railways & Union Stock Yards Co. et al.*, 49 N. J. Eq. 217, 35 Am. & Eng. Corp. Cas. 388.

The plea of *ultra vires* will be rejected by the court when it involves other parties. *Norwich v. Norfolk R. Co.*, 4 El. & Bl. 449.

And where it would defeat the ends of justice or work a legal wrong. *Ohio & Miss. R. Co. v. McCarthy*, 96 U. S. 258.

The doctrine of *ultra vires* has no application to the wrongs done by a corporation; hence corporations are liable for every wrong of which they are guilty. *Philadelphia W. & B. Co. v. Quigley*, 21 How. (U. S.) 209; *Green v. London Omnibus Co.*, 7 C. B. 290; *Life & Fire Ins. Co. v. Mechanics' Ins. Co.*, 7 Wend. (N. Y.) 31.

Same—Lending Corporate Credit.—It is well settled that in the absence of statutory or charter authority a corporation has no power either direct or incidental, to bind itself by making or indorsing negotiable instruments for the accommodation of the makers, even for a consideration paid. *National Park v. German American Mut. W. & S. Co.*, 116 N. Y. 281, citing *Central Bank v. Dressing Co.*, 26 Barb. (N. Y.) 23; *Bridgeport City Bank v. Same*, 30 Barb. (N. Y.) 421; *Farmers' & Mechanics' Bank v. Same*, 5 Bosw. (N. Y.) 275; *Morford v. Bank*, 26 Barb. (N. Y.) 268; *Bank v. Bank*, 13 N. Y. 309; *Bank v. Insurance Co.*, 50 Conn. 167; *Bank v. Globe Works*, 101 Mass. 57; *Davis v. Railroad Co.*, 131 Mass. 258; *Culver v. Real Estate Co.*, 91 Pa. St. 367; *Hall v. Turnpike Co.*, 27 Cal. 255.

A national bank cannot become an accommodation endorser or loan its credit. *National Bank of Commerce v. Atkinson*, (C. C.) 55 Fed. Rep. 465.

The cashier of a bank is not presumed, by reason of his official position, to have power to bind the bank as an accommodation endorser on his individual note; and if the payee of such note fails to prove that the cashier has such authority to make such endorsement he cannot recover against the bank. *West St. Louis Saving Bank v. Shawnee Co. Bank*, 95 U. S. 557.

It seems that while a banking association cannot lawfully become an accommodation endorser for other persons, or in any way lawfully become a party to accommodation paper, it may endorse commercial paper which comes into its hands in the ordinary course of business, with a view to raise money upon the same by way of discount. *Bank of Genesee v. Patchin Bank*, 13 N. Y. 309.

It is beyond the power of a railroad corporation or of a corporation organized for the manufacture and sale of musical instruments, to guarantee the payment of the expenses of a musical festival, and no action can be maintained against either corporation upon such a guaranty, although it was made with the reasonable belief that the holding of the proposed festival would be of great pecuniary benefit

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to the corporation by increasing its proper business, and the festival has been held and expenses incurred in reliance upon the guaranty. *Davis v. Old Colony R. Co.* 131 Mass. 253; *distinguished* in *Sutro Tunnel Co. v. Segregated Belcher Min. Co.*, 19 Nev. 129.

Illustrative Cases.—In *Lucas, Cashier, etc., v. White Line Transfer Co.*, 70 Iowa 541, the defendant was a corporation organized for the purpose of engaging in the "general freight and transfer business." By its secretary it joined the plaintiff, the Valley National Bank, in executing a bond of suretyship for certain parties to a brewing company. The parties thus bonded afterwards failed, but gave to the plaintiff and the defendant their note for the amount of the bonds in consideration of the payee assuming that amount of their indebtedness to the brewing company. The defendant then, by its president, joined the plaintiff in a letter to the brewing company in which the indebtedness of the parties bonded was assumed to the amount of the note. The defendant also joined the plaintiff in an action on said note against the makers thereof. The defendant refused to pay to the brewing company any portion of the indebtedness thus assumed, and the plaintiff paid the whole of it, and in this action sought to recover contribution from the defendant as a co-surety. *Held*, that the defendant's original contract of suretyship was *ultra vires*, as was also its assumption of indebtedness by the letter signed by its president, and that the other acts of its officers did not estop it from insisting upon the defense of *ultra vires*, and, hence that no recovery could be had upon that contract.

In *Credit Co. v. Howe Machine Co.*, 54 Conn. 357, it was shown that the defendant was a manufacturing corporation organized under the laws of the State of Connecticut with its principal office in the City of New York, and limited by its charter to such use of mercantile paper as should be necessary to the convenient prosecution of its business, which paper its treasurer, by vote of its directors, was authorized to execute on behalf of the company. S., who had been its president, and was still a large stockholder, drew drafts upon the defendant company in London, England, where he was engaged in stock speculation, and which drafts were accepted by the treasurer of the company, but were subsequently protested for non-payment. S. had previously had funds in the hands of the company against which he had previously drawn, and the drafts had been accepted and paid, but at the time the protested drafts were made his account was largely overdrawn and the acceptance of them was for his accommodation. These drafts, at the time they were drawn and before acceptance, were discounted by the plaintiff company through one W. who was a member and the managing director of the plaintiff company, and the proceeds were delivered to S. and by him immediately placed to his credit with W. & Co., a firm to which he was largely indebted, and of which W. was a member. The plaintiff company had previously discounted similar drafts for S., which had been accepted and paid, and the treasurer of the defendant company had previously accepted drafts of S. for his accommodation with the knowledge of the directors. In this suit, which was brought upon the protested drafts, it was, among other things, *Held*:

1. That although the defendant company had power by its charter to deal only in mercantile paper necessary to its business, yet as it had that power it would be holden by the acceptances in question

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except against a party who took the paper in issue knowing that they were accommodation acceptances.

2. That it did not follow that the plaintiff took the paper in question in bad faith because of the object for which S. procured the money, since he might have drawn upon funds of his own in the defendant's hands, and if so, the intended use of the money was of no consequence.

3. That the plaintiff company was not to be regarded as not a holder for value because of the fact that the money obtained was placed to the credit of S. with W. & Co., to whom he was indebted; since the fact that W. was a member and managing director of the plaintiff company, and also a member of W. & Co., did not create a community of relation to the transaction on the part of the two companies.

See also *Webster & Co. v. Howe Machine Co.*, 54 Conn. 394, which action was heard with the one just mentioned, the facts being common to both, but wherein, upon additional facts peculiar to itself, it was *held* that a corporation cannot acquire a right to accept drafts for accommodation by assuming and repeatedly exercising the right, and that neither the directors or stockholders, by permission or ratification, can confer the power on any of the officers.

Held, also, that where a party takes such an acceptance without notice that it is for the accommodation of the drawer, and the acceptance is by an officer of the corporation authorized by it to accept it if the drawer has funds in the company's hands, the holder is not affected by the extrinsic fact of the want of funds, and hence can recover upon the acceptance if he is a *bona fide* holder for value.

In *Madison Plank Road Co. v. Watertown Co.*, 7 Wis. 59, the plaintiff company, in order to aid the defendant company to build a plank road which was a continuation of the road of the former, agreed to guarantee a loan made to the Watertown Co. After the road was built, the Madison Co. refused to pay on the default of the Watertown Co. The supreme court held that the Madison Co. had no corporate power to guaranty payment of the debt of the other company, and when pressed with the argument that by the building of the road the Madison Co. had received the benefit which had induced it to guarantee the debt, the court said that it was a contract *ultra vires*, and could not be enforced.

The leading case in England upon this point is *Colemand v. Eastern Counties R. Co.*, 10 Beav. 1. In this case, under powers contained in the acts of Parliament, the Eastern Counties R. Co., and the Eastern Union Ry. Co., had built a railroad from London to Manningtree, a place about ten miles from the port of Harwich. The directors of these companies conceived that it would add to the traffic and profit of the railway if a steam-packet company could be formed communicating between Harwich and the northern ports of Europe, and they accordingly took proceedings for the establishment of such a company. It was intended that the railway companies should guarantee to the shareholders in the steam-packet company a dividend of 5 per cent. per annum upon their paid up capital until the dissolution of the company, and that then the whole paid up capital should be paid by the railway companies to the shareholders of the packet company in exchange for a transfer of its assets. On a bill by a shareholder of the railway company to enjoin, it was held that no such contract was within the power of the railway companies,

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and further proceedings in the matter were enjoined. *Cited and approved* in *Pearce v. Madison & Indianapolis R. Co.*, 21 How. (U. S.) 441.

Where the general railroad laws declare that any railroad company may, by means of subscription to the capital stock of any other company, or otherwise, aid such company in the construction of its road for the purpose of forming a connection between said last mentioned road and the road owned by the company furnishing such aid, and authorizes two or more railroad companies whose lines are connected, to enter into any arrangement for their own benefit, such last mentioned companies have power to enter into an arrangement with each other for the purpose of securing a uniform gauge for the connecting roads, and to make it a part of such arrangement that one or more of the companies should guarantee the payment of the interest coupons issued by another company. *Connecticut Mut. Life Ins. Co. v. Cleveland C. & C. R. Co.*, 41 Barb. (N. Y.) 9.

If the guarantors, under the circumstances above named, have the general power to make the guarantee, it is immaterial as between third parties, without notice, and such guarantors, whether their acts are authorized or ratified by a vote of the stockholders in accordance with the proviso of the general railroad statutes of the state giving such authority; this proviso being intended for the protection of the shareholders and relating altogether to the mode or manner of the execution of the power. *Ibid.*

Where a statute confers express authority upon a corporation to guarantee the bonds of another corporation, a mere failure on the part of the guaranteeing company to pursue the mode specified in the statute will not invalidate such guarantee in the hands of a *bona fide* holder. *Peoria, etc., R. Co. v. Thompson*, 103 Ill. 187, 7 Am. & Eng. R. Cas. 101; *Bradley v. Ballard*, 55 Ill. 413; *Arnot v. Erie R. Co.*, 67 N. Y. 315.

Accordingly in *Atchison, T. & S. F. R. Co. v. Fletcher*, 35 Kan. 236, 24 Am. & Eng. R. Cas. 34, it was held that if under the provisions of its charter, and the terms of subsequent statutes, a corporation gives its guarantee of a negotiable instrument which it takes as its own and sells, it can be held to its guarantee by an innocent holder for value and without notice of the origin of its title, and this, irrespective of the question whether the guarantee of the particular instrument when made, was *ultra vires* in that particular instance.

Where an agent of a corporation who is duly authorized to sign "all notes and business paper" of the corporation, gives accommodation notes in the name of the company, the latter is liable on them to a holder who took them in good faith for value, and before maturity, notwithstanding the fact that the agent had no authority to execute such notes for the purposes for which they were given. *Bird v. Daggett*, 97 Mass. 494.

The general doctrine of the law is that where a corporation has the power, under any circumstances, to issue negotiable paper, a *bona fide* holder has a right to assume that it was issued under circumstances which give the requisite authority, and such paper is no more liable to be impeached for any infirmity in the hands of such a holder than any other commercial paper. *Gelpcke v. City of Dubuque*, 1 Wall. (U. S.) 175. And this doctrine is applied to commercial paper made by a corporation for the accommodation of

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a third person, when in the hands of a *bona fide* holder who has discounted it before maturity on the faith of its being business paper. *Mechanics' Banking Association v. White Lead Co.*, 35 N. Y. 505; *Bird v. Daggett*, 97 Mass. 494; *Monument National Bank v. Globe Works*, 101 Mass. 57.

COLUMBIA NAT. BANK

v.

GERMAN NAT. BANK.

(*Supreme Court of Nebraska, Dec. 8, 1898.*)

Evidence—Testimony—Definitions.—"Testimony" and "evidence" are not synonymous terms; the latter is the generic term, and the former applicable to a species or kind of evidence.

Bills of Exceptions.—If a bill of exceptions, which purports to contain all the evidence, is submitted to the adverse party for examination and amendment, and he returns it with an indorsement that he has no amendments to propose, it will be presumed to contain all the evidence. *Cattle v. Haddox*, 14 N. W. 803, 14 Neb. 59.

Same—Certificate.—The use of the word "testimony" for "evidence," in the certificate of the trial judge in the allowance of a bill of exceptions, if the meaning is obvious, or it is clear that the latter is intended, will not render the document inoperative.

Transfer of Deposit by Check.—A check upon a bank by a depositor operates a transfer of its amount to the payee if on deposit at the time of presentation, and the payee or holder may, on refusal of payment, maintain a suit on the instrument for the recovery of its stated sum.

Right of Bank to Set-off Deposit against Indebtedness.*—As against the holder of a check against an account of a depositor, the bank of deposit may not apply the amount of the account to the payment of the indebtedness of the depositor to the bank which is not yet due, although the depositor may be insolvent.

Defenses—Estoppel.—Two defenses irreconcilably inconsistent may not be enforced, and the position assumed by the party prior to the suit relative to the facts and circumstances involved in the transactions drawn into question will prevail.

(Syllabus by the Court.)

ERROR by plaintiff to Lancaster county district court. *Reversed.*

J. H. Broady and *E. E. Brown*, for plaintiff in error.

N. C. Abbott and *Abbott, Selleck & Lane*, for defendant in error.

*See notes at end of case.

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HARRISON, C. J. On June 2, 1893, the State Bank of Courtland was engaged in the business suggested by its name, and at the place thereby indicated, and in the course of such business drew and Case Stated. forwarded an order or a check on the German National Bank of Lincoln in favor of "J. H. McClay, Cashier," he being such officer of the Columbia National Bank of Lincoln, for the sum of \$898, and inclosed the same in an envelope addressed, "Columbia National Bank, Lincoln, Nebraska," and mailed the package. On June 3d, it did likewise in relation to an order or check similar in form and substance in the material portions except amount, which was \$3.88. The instruments, or checks we may call them,—for, whatever may be the proper technical designation, they were, in effect, checks, and to be considered as such (Bull v. Bank, 123 U. S. 109, 8 Sup. Ct. 62),—were received through the mail by the Columbia National Bank on June 7, 1893, and were, in the morning of the day of reception, presented to the drawee for payment, which was refused. The Bank of Courtland had an account with the German National Bank, and on the morning of June 7, 1893, there was to the credit of the former the sum of \$983, which was subject to check. At the close of business on June 6, 1893, the Bank of Courtland suspended, and passed into the hands of a receiver, who afterwards continued in possession for the sole purpose of adjustment of its affairs. The Bank of Courtland was a debtor of the German National Bank, the indebtedness being evidenced by promissory notes which were payable on dates subsequent to June 7, 1893, or they were not then due, but on that date the amount which was shown by the open account in favor of the Bank of Courtland was by the German National Bank credited as a payment on one of the notes to which we have just referred, and the account balanced or closed. In this, an action by the Columbia National Bank against the German National Bank to recover the amount of the two checks sent it by the bank at Courtland, the defendant was accorded a judg-

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ment, to reverse which the plaintiff has prosecuted error proceedings to this court.

What may not be inaptly termed a preliminary question, which has its origin in the condition of the record as presented, is raised and urged for the defendant. The certificate of the trial judge of the allowance of the bill of exceptions recites Evidence—Testimony—Definitions. that the document contains "all the testimony adduced or offered on the hearing of the" cause, and in other portions of its statements the reference in each is to "testimony." It is of this it is objected that it is insufficient, inasmuch as testimony means but a part of the evidence, and the certificate should show that all the evidence was included in the bill of exceptions. It is incontestably true that "testimony" and "evidence" are not synonymous terms; that testimony is but a kind or species of evidence; that the former is, in a trial, the portion of the latter which may be given orally by witnesses; that the latter is inclusive of the testimony of witnesses, documents, etc.; that "evidence" is the generic term (*Printing Co. v. Morss*, 60 Ind. 153); and if we were confined to the certificate, and could look no further, it might be fatal to the bill of exceptions (*Printing Co. v. Morss*, *supra*; *Lindley v. Dakin*, 13 Ind. 388). But an examination of other parts of the document reveals that it was presented, as the law required, to Bills of Exceptions. the adverse party for examination and proposal of amendments, and returned indorsed, "I herewith return the within bill of exceptions, and suggest no amendments," over the signature of counsel. From such an indorsement the presumption arises that the bill of exceptions on which it appears contains all the evidence, though the certificate of the trial judge may not so state. *Cattle v. Haddox*, 14 Neb. 59, 14 N.W. 803. There being nothing in this record to indicate to the contrary, such presumption must be indulged and govern. Furthermore, if the certificate be Same—Certificate. read in connection with other matters of the bill of exceptions to which it is attached, it is clearly

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disclosed that "testimony" therein is used as the equivalent of "evidence"; and, when this is true, it is sufficient. *Harris v. Tomlinson*, 130 Ind. 426, 30 N.E. 214.

It is the contention for the plaintiff that the judgment of the trial court was violative of the rules that a check drawn on funds in a bank is an appropriation of its amount in favor of the holder, and on refusal of its payment, where the funds have not been drawn out prior thereto, the holder may sue for the recovery of the amount (*Fonner v. Smith*, 31 Neb. 107, 47 N. W. 632); and, further, that the bank could not, as against the rights of the holder of the checks, apply the deposit or money on open account subject to check to the payment of a debt of the depositor to the bank which had not matured or was not due. We believe these propositions advanced for the plaintiff are sound, and will adopt them. They

Transfer of Deposit
by Check.

Same.

are thoroughly supported by precedent, and we think the logic and reason applicable to the events and circumstances of the matter in hand. Counsel for plaintiff have cited the following cases, which fully sustain their position: *Bank v. Robinson*, 97 Ky. 552, 31 S. W. 136; *Fourth Nat. Bank v. City Nat. Bank*, 68 Ill. 398; *Fuller v. Steiglitz*, 27 Ohio St. 355; *Jones v. Bank*, 10 Wkly. Notes Cas. 102; *Bank v. Jones*, 2 Penny. 377; *Oatman v. Bank*, 77 Wis. 501, 46 N. W. 881; *Bank v. Ritzinger*, 20 Ill. App. 27; *Skunk v. Bank*, 16 Wkly. Law Bul. 353; *Spaulding v. Backus*, 122 Mass. 553.

It was of the evidence that on the morning of the 7th of June, 1893, the cashier of the defendant bank had a telephonic conversation with the president of the Bank of Courtland, in which the propriety of the action of the former in applying the amount of the open account of the latter as a payment on its debt to the former which was not yet due was discussed, and, soon after this conversation was closed, the president of the Bank of Courtland sent a telegram to the said cashier, in which he attempted, for the bank, to authorize such action as

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ness.

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we have indicated. The telegram was of date the 7th of June, and stated: "Apply our balance on our indebtedness. State Bank Courtland." But all this was futile, for the Courtland Bank had, on the evening of the 6th of June, passed from the control of its officers into the hands of the officers of the state, and it was no longer a going concern.

It appeared in evidence that of the amount of the open account of the Courtland Bank with the defendant at or about the times of the transactions involved herein there was the sum of \$590.05, the amount of a draft received from the bank at Courtland, and with which it was credited, and of which payment was refused on presentation to the bank in Chicago on which it was drawn. It was subsequently paid, but this fact cuts no figure in the present controversy. It is now urged for defendant that it had the right, when the payment of this draft was refused, to charge its amount back against the account of the Courtland Bank, and, this being true,

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there was not money to pay the checks of plaintiff in the hands of defendant, and its refusal of payment was warranted, and must be upheld. As we view this matter as developed in the evidence, the defendant has furnished by its action a solution of this question. On the morning of the 7th of June it had no hesitancy, when it desired to apply the amount of the balance of the account of the Bank of Courtland to the payment of its debt to the defendant, in considering the whole of such amount as belonging unqualifiedly to the Bank of Courtland, and will not be heard to assert now, if such money cannot be applied as it was then placed, it was but conditionally the property of the Bank of Courtland, and we will now take another and different position in regard to it. It follows from what has been said that the judgment of the trial court was wrong, and it must be reversed. Reversed and remanded.

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Bank's Set-off.—The bank may apply the balance of a depositor on a debt due it from him, maturing upon a day stated, although there is a check outstanding in favor of a third person, and the de-

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positor has made an assignment for the benefit of his creditors. *Fort Dearborn Nat. Bank v. Blumensweig*, 46 Ill. App. 297; *Schuler v. Laclede Bank*, 27 Fed. Rep. 424. See also *Merchants', etc., Bank v. Meyer*, 56 Ark. 499.

But until the debt matures there is no lien or right of set-off. *Commercial Nat. Bank v. Proctor*, 98 Ill. 558; *Merchants' Nat. Bank v. Ritzinger*, 20 Ill. App. 27; *Chicago Fourth Nat. Bank v. City Nat. Bank*, 68 Ill. 398; *State v. Beach* (Ind. 1896), 43 N. E. Rep. 949; *Lockwood v. Beckwith*, 6 Mich. 168, 72 Am. Dec. 69; *Zelle v. German Sav. Inst.*, 4 Mo. App. 401; *Van Allen v. American Nat. Bank*, 3 Lans. (N. Y.) 517; *Beckwith v. Union Bank*, 4 Sandf. (N. Y.) 604, *affirmed* in 9 N. Y. 211; *Bradley v. Angel*, 3 N. Y. 475; *Myers v. Davis*, 22 N. Y. 489; *Martin v. Kunzmüller*, 37 N. Y. 396; *Jordan v. National Shoe, etc., Bank*, 74 N. Y. 467, 30 Am. Rep. 319; *Newcomb v. Almy*, 96 N. Y. 308; *Richards v. La Tourette*, 119 N. Y. 54; *Fuller v. Steiglitz*, 27 Ohio St. 355, 22 Am. Rep. 312; *Oatman v. Batavian Bank*, 77 Wis. 501, 20 Am. St. Rep. 136. Compare *Boettcher v. State Nat. Bank*, 15 Colo. 16.

Same—Insolvency of Depositor.—But upon the insolvency of the depositor, the right of set-off has been allowed, although the bank's liability was contingent merely. *Citizens' Bank v. Kendrick*, 92 Tenn. 437, 36 Am. St. Rep. 96.

A, being debtor to a bank in a note discounted by the bank, died before the note became due, and his estate proved to be insolvent. The bank, at the time of his death, had money of his on deposit. It was held that the bank was entitled to apply such deposit money to the payment of the note, notwithstanding there might be debts outstanding against A's estate of superior dignity to that of the note. *Ford v. Thornton*, 3 Leigh (Va.) 695.

Same—Moneys Must be Property of Depositor.—As against third parties, the indebtedness of the bank that becomes subject to this right of lien must have arisen from the deposit of moneys or funds that belonged to the depositor himself. *Farmers', etc., Bank v. Farwell*, 53 Fed. Rep. 633. In this case a party, being indebted to a bank and also to a firm, assigned to the latter his interest in certain insurance policies. He also prosecuted actions on the policies in his own name and right, testifying that he solely was interested therein. Before this he had refused to assign the policies to the bank, but told the officers that when he collected the proceeds he would deposit them, and the bank could repay itself; and the bank, without knowledge of the assignment, and relying upon these statements, gave him further credit and made him other loans. Afterwards, upon a settlement of certain of the actions above named, the attorney for the assignor, without the latter's knowledge or that of the assignee, deposited the proceeds in the bank. It was held that by the assignment the whole beneficial interest in the policies passed to the assignee and entitled him, as against the bank, to the proceeds of the settlement; and further, that the assignee was not estopped to claim the money because of his failure to notify the bank of the assignment, nor for suffering the prosecution of the actions in the name of the assignor, as he was without knowledge of the fact of the assignor's indebtedness to the bank, or that the latter intended to grant him further credit.

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FARMERS' NAT. BANK OF OWATONNA

v.

BACKUS *et al.*

(*Supreme Court of Minnesota, Nov. 22, 1898.*)

National Banks—Existence after Expiration of Charter.—A national bank, after the expiration of the time limit of its charter, continues to exist as a person in law, capable of suing and being sued, until its affairs are completely settled.

Receiver's Expenses and Fees—Liability of Petitioner.*—Held, upon the special facts of this case, that the trial court did not err in ordering the appellant to pay the balance of the fees and expenses of the receiver herein.

(Syllabus by the Court.)

APPEAL by plaintiff from Ramsey county district court. *Affirmed.*

Sawyer & Sperry, for appellant.

Stevens, O'Brien, Cole & Albrecht, for respondent.

START, C. J. The respondent, James A. Owens, presented his verified petition to the district court of the county of Ramsey, which set forth substantially these facts: The petitioner, on July 3, 1895, was by order of the court appointed receiver in this action of the real estate which was the subject-matter thereof (conceded on the argument to be an apartment house on which the plaintiff had a second mortgage), and has continued to act as such receiver to the present time. That the defendant Hiram Backus appealed from the order to this court, giving to the plaintiff in this action a bond conditioned for the payment to it of such loss as it might sustain on account of the appeal. Pending the appeal, the income of the property was paid to the defendant. This court

Case Stated.

*See note at end of case.

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affirmed the order appointing the receiver. 64 Minn. 43, 66 N. W. 5. Thereupon the plaintiff, by action on the bond, recovered from the defendant and his sureties the sum of \$3,100, as damages for the income from the property it was unable to collect through the receiver pending the appeal. The petition further sets forth the amount of respondent's costs and expenses necessarily incurred in the receivership, the amount of his reasonable fees for services, the amount of money which actually came to his hands as receiver from the property, which was less than his expenses and fees; also, that the property had been lost by foreclosure of a prior lien, that the defendant was insolvent, and that the receiver had no money or funds in his hands to pay the balance of the fees and expenses. The prayer of the petition was that the plaintiff be required to pay such balance. The district court made its order requiring the plaintiff to show cause why the prayer of the petitioner should not be granted. The plaintiff appeared specially in response to the order, filed an affidavit to the effect that its charter expired by limitation, and it went into voluntary liquidation, which had been consummated, and that at the date of the order its corporate existence had ceased, and on this ground objected to the jurisdiction of the court. The objection was overruled, and it then appeared generally; but, so far as appears from the record, it did not put in issue any of the facts of the petition, or question the propriety, necessity, or reasonableness of the respondent's charges for expenses and fees as receiver. The trial court found, among other facts, that the respondent was appointed receiver at the request of and for the benefit of the plaintiff, and adjudged the balance due to the respondent for such expenses and fees to be \$578.52, and ordered that the plaintiff pay this amount to the receiver. The plaintiff appealed from this order.

The appellant here insists on two propositions only:

(1) That the trial court erred in overruling the objection to its jurisdiction. It is urged that after the

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expiration of the appellant's charter, and it had passed through liquidation, "the law determined its status,—it was dead. How could an order of the district court galvanize it into life?" It seems to have done so, for since the making of the order the appellant has been very much alive. It appealed to this court, gave a *superse-deas* bond, and presented a vigorous and able argument on another question involved in this appeal. A national bank, after the expiration of the time limit of its charter, continues to exist as a person in law, capable of suing and being sued, until its affairs and business are completely settled. 22 Stat. 162, § 7; National Bank v. Insurance Co., 104 U. S. 54. The appellant commenced this action, and the business then undertaken by it has not as yet been fully completed. The objection to the jurisdiction of the court was properly overruled.

National Banks—
Existence after
Expiration of
Charter.

2. The second proposition is that, a receiver being an officer of the court, subject to its control, and not to that of the party asking for his appointment, his fees and expenses are chargeable solely against the fund which comes into his hands as receiver. The parties to the action are not personally liable therefor, unless they have given a bond or other contract to pay them, as a condition of the appointment or continuance of the receiver. This may be conceded to be correct as a general rule, but there are cases where the court will, if the fund in court be insufficient to give the receiver reasonable compensation and indemnity, require the parties at whose instance he is placed in possession of the property to pay him. Johnson v. Garrett, 23 Minn. 565; Knickerbocker v. Mining Co., 67 Ill. App. 293; High, Rec. § 796.

Receiver's Ex-
penses and Fees—
Liability of Peti-
tioner.

The special facts of this case fully justify the order of the trial court. It is not a case where the party asking for the appointment of a receiver is required to pay the receiver's charges without having received any benefit from the receivership. It is a case where the benefits so received were more than five times as great

Note

as the amount required to be paid. It was only by the appointment of the respondent as receiver, and his acceptance thereof, and services as such in this case, that the appellant was enabled to obtain the \$3,100 recovered of the defendant and his sureties. After the defendant appealed from the order appointing the receiver, and pending the appeal, he received the income of the property, which would otherwise have been paid to the receiver; and the effect of the decision of this court affirming the order was to establish the right of the receiver to such income from the date of his appointment. *Bank v. Backus*, 64 Minn. 43, 66 N. W. 5. If the defendant had been solvent, and the receiver had recovered such income from him, the fund would have been chargeable with the receiver's fees and expenses. But, the defendant being insolvent, the money was recovered on his bond in an action by the appellant. The basis, however, of such recovery, must have been the fact that the receiver was kept out of the possession of the property pending the appeal by reason thereof, and was entitled to the income of the property during such time. The fund received by the appellant came to it by reason of the receivership, and not otherwise; and equitably it ought to have paid over to the receiver so much of it as was necessary to indemnify him for his expenses, and to compensate him for his services, in the receivership. It would be grossly inequitable to permit the appellant to appropriate the entire fund to its own use, and leave the respondent unpaid for his services, and without reimbursement for the expenses of a receivership undertaken at its request, and for its sole benefit, whereby it secured \$3,100. The order of the court requiring the appellant to pay the receiver is, in effect, the enforcement of the receiver's equitable right to be paid from a fund growing out of the receivership. Order affirmed.

NOTE.

Compensation of Receivers—Liability of Petitioners.—If the fund in court is insufficient to afford an adequate compensation to the receiver, the parties at whose instance the receiver was appointed may be required to provide the means of payment. *Tome v. King*, 64 Md. 166.

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NATIONAL BANK OF COMMERCE IN DENVER

v.

ALLEN *et al.*

(*Circuit Court of Appeals, Eighth Circuit, Oct 31, 1898.*)

Corporations as Endorsers.—A corporation formed to carry on a mercantile business may pay for the requisite merchandise by endorsing the outstanding paper of the seller.

Agency.—A corporation does not become the agent of a bank merely because the bank holds a part of its stock in pledge to secure a debt.

Same.—Nor is the relation of principal and agent established, as between two corporations, because an officer or employee of one is a member of the board of directors of the other.

Preference of Creditors.—A bank holding a large portion of the stock of a corporation indebted to it, as security for the debt, is entitled to use its influence to induce the corporation to sell its effects and apply the proceeds to the extinguishment of such debt, a private corporation having, as a general rule, the same power to prefer creditors as that possessed by an individual.

Right to Vote Pledged Stock.*—Where corporate stock is pledged to secure a debt, the right to vote it under the laws of Colorado, in the absence of an express agreement to the contrary, remains with the pledgor.

Banks—Corporate Debts—Public Notice.—A bank holding corporate stock as collateral security for a debt owing to it by the corporation, is under no obligation to give public notice of the amount of the debt.

Creditor's Bill—Intervention.—A judgment creditor may intervene after a creditor's bill has been properly filed in a federal court, although his judgment is for less than \$2,000.

APPEAL by defendants from the Circuit Court of the United States for the District of Colorado. *Remanded.*

This was a creditors' bill, which was exhibited by George A. Allen and others, the appellees, composing the firm of Paris, Allen & Co., against the National Bank of Commerce in Denver, the appellant, and against the A. K. Clarke Mercantile Company, hereafter termed the "Mercantile Company." The bill was filed by Paris, Allen & Co.,

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*See notes at end of case.

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as judgment creditors of the Mercantile Company, for their own benefit, and for the benefit of such other judgment creditors of the Mercantile Company as might thereafter join in the proceeding and contribute to the expense thereof; whereupon several other judgment creditors of the Mercantile Company did unite in the proceedings and become parties complainant.

The relief sought is based upon grounds set forth in the bill of complaint, which may be summarized as follows: The Mercantile Company was organized on or about April 26, 1893, under the laws of the state of Colorado, for the ostensible purpose of acquiring and succeeding to the business of A. K. Clarke, who for some time previously had been engaged in the wholesale and retail liquor business in the city of Denver, Colo., which business was transacted in the name of A. K. Clarke & Co. The capital of the Mercantile Company was fixed at \$200,000, consisting of 2,000 shares, of the par value of \$100 each, and the stock was all issued to said Clarke and two other persons by him designated, as full-paid stock, in exchange for the stock of liquors, warehouse receipts, and other property formerly belonging to said Clarke. 1,998 shares of said stock were issued to Clarke personally, and 1 share each to two other persons, who forthwith became directors and officers of the corporation. Clarke was at the time indebted to the National Bank of Commerce in Denver, the appellant, in the sum of \$50,000, and he forthwith assigned the 1,998 shares of stock in the Mercantile Company to said bank, as collateral security for his individual indebtedness. Immediately upon its organization the Mercantile Company engaged in the wholesale liquor business at the place formerly occupied by Clarke, and continued to transact such business until January 10, 1895, and in the meantime became indebted to the firm of Paris, Allen & Co., for liquors purchased, in the sum of \$3,250, and to the other complainants as well, the total indebtedness aggregating about \$20,000. The aforesaid indebtedness was contracted with the full knowledge of the National

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Bank of Commerce in Denver, hereafter termed the "Bank," which was acquainted with the purchases that were from time to time made by the Mercantile Company. Upon its organization the Mercantile Company guarantied and indorsed the individual obligations of said Clarke to the bank ; doing so, as the bill alleged, without consideration, and for the purpose of creating a fictitious indebtedness from the Mercantile Company to the bank. On or about January 10, 1895, the Mercantile Company sold and transferred its property and assets to another corporation, called the "Colorado Mercantile Company" for the sum of \$50,000, the whole of which sum, when received, was paid to the defendant bank. The complainants below further charged, on information and belief, that the Mercantile Company was organized for the purpose of enabling Clarke to avoid the payment of his individual debts, amounting at the time to \$50,000 ; that the sale by the Mercantile Company to the Colorado Mercantile Company, in January, 1895, was made for the sole purpose of enabling the vendor to avoid the payment of its just debts, particularly the several debts due to the complainants, and for the purpose of hindering and delaying its creditors in the collection of their debts, and to secure the payment of the indebtedness due from Clarke individually to the bank ; and that by the sale made by Clarke to the Clarke Mercantile Company, and by the assignment of Clarke's 1,998 shares of stock to the defendant bank, as collateral security, the bank became the sole owner of the property of the Mercantile Company, and conducted the wholesale liquor business in the name of the latter company, for its sole use and benefit, from April, 1893, until the sale in January, 1895, to the Colorado Mercantile Company. The complainants also charged that during the last-mentioned period the bank, acting in the name of the Clarke Mercantile Company, published to the commercial world that the stock of said company had been fully paid up by the sale and transfer of Clarke's stock of goods to said company ; that the value of the property and as-

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sets of said company exceeded \$115,000 ; that its debts did not exceed \$10,000 ; that the foregoing statements were made for the purpose of deceiving persons who had dealings with the Mercantile Company, and to induce such persons to sell goods to said company ; that thereby the complainants were in fact induced to sell goods to the Mercantile Company, shortly prior to the sale of its business to the Colorado Mercantile Company, which goods were on hand at the time of said sale ; and that the proceeds thereof, on the occasion of such sale, were paid to and received by the defendant bank, and were still held by it. They further charged that the Mercantile Company was at no time indebted to the bank in a sum exceeding \$10,000. It was finally charged that the business aforesaid was conducted in the manner aforesaid,—that is to say, by the bank in the name of the Clarke Mercantile Company,—“for the purpose of covering and concealing a secret trust in favor of the said respondent bank, and for the purpose of hindering, delaying, and defrauding the creditors of said respondent company, and particularly your orators, in the collection of their just claims and demands against the said respondent company.”

The bank, by its answer, denied, in substance, that the Mercantile Company had ever been its agent for the transaction of any business, or that it had ever transacted any business in the name of that company, or that it had ever made any statements to the commercial world such as were imputed to it in the bill of complaint, to the effect that the stock of the Mercantile Company was fully paid up, or concerning the value of its property and assets. It also denied in detail all other allegations contained in the bill which tended to show that it had become a party to any scheme to wrong or defraud the complainants or either of them. The case comes to this court on appeal from a decree in favor of the complainants below, which adjudged that the defendant bank should pay to the respective complainants the amount of their several demands against the Clarke Mercantile Company, all of which

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had been reduced to judgment, together with interest thereon at the rate of 8 per cent. per annum from and after November 2, 1895.

A. B. Seaman, for appellant.

Lucius M. Cuthbert (*Henry T. Rogers* and *Daniel B. Ellis*, on the brief), for appellees.

Before SANBORN and THAYER, Circuit Judges, and SHIRAS, District Judge.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

It is claimed in behalf of the appellees, who were the complainants below, that the Clarke Mercantile Company indorsed the individual notes of A. K. Clarke, which were at the time held and owned by the appellant, the National Bank of Commerce in Denver, without receiving any consideration therefor, and that the indorsements in question were for that reason *ultra vires* and void. On the assumption that the indorsements were without consideration, it seems to be further contended that, when the Mercantile Company discharged its liability to the bank on account of such indorsements by paying the notes, it acted wrongfully and in fraud of the rights of the appellees, and that the money so paid on account of the indorsements can be recovered by them from the bank, notwithstanding the admitted fact that none of the debts now due to the appellees were contracted by the Mercantile Company until more than a year after the indorsements were executed. We think it sufficient to say, concerning this contention of the appellees, that the proof does not support the charge that the indorsements were executed without consideration. The trial court was of the same opinion, and we fully concur in its views on that point. The record discloses that, at the first meeting of the directors of the Mercantile Company, Clarke proposed to sell and convey to said company his entire stock in trade, consisting of liquors, cigars, fixtures, and all other property, provided the company

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would issue to him its entire capital stock as full paid and nonassessable, and provided, further, that the company would indorse the notes of said Clarke to the National Bank of Commerce in Denver, in the sum of \$77,500, in consideration of the transaction. The proposition which was made by Clarke obligated him to further secure his notes to the bank by hypothecating a sufficient amount of the capital stock of the Mercantile Company, when the same was issued to him, but it was expressly stated in his proposition to the company that the indorsement of his notes to the bank should form a part of the consideration for the proposed transfer of his stock in trade to the Mercantile Company. This proposition on the part of Clarke was accepted; his stock in trade was conveyed to the Mercantile Company; its total capital stock was issued to Clarke, or to such persons as were by him designated to receive it; and two notes of Clarke, one for \$50,000 and one for \$27,500, which were then held by the bank, were forthwith indorsed by the Mercantile Company. Moreover, we find no reason to doubt that the bank at that time held, as collateral security, many warehouse receipts for goods which then formed a part of Clarke's stock in trade, and we think it is most probable that the bank surrendered such collateral to enable Clarke to transfer his property and business to the Mercantile Company. In view of these facts, we think that the Mercantile Company did receive a valuable consideration for the indorsement of Clarke's individual notes, and that the contention to the contrary is without merit. It may be that the creditors of the Mercantile Company, in a proper proceeding, would be able to show that by the transaction in question the par value of its stock was not fully paid, but there is no greater reason for saying that the notes were indorsed without consideration than there would be for asserting that nothing was paid on the capital stock. The transfer of the stock in trade and the indorsement of the notes formed a part of the same transaction, and the former act was the consideration

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for the latter. Nor do we perceive that there was any want of power on the part of the Mercantile Company to execute the indorsements. It was organized "to carry on a wholesale, retail, and jobbing liquor, cigar, and tobacco business," which involved the right to purchase the requisite stock of such articles, and it could purchase the same either by paying cash therefor, or by endorsing the outstanding paper of the party from whom it acquired them, if that method of payment was deemed satisfactory.

Corporations as
Endorsers.

The appellees also predicate a right to relief on the ground that the appellant bank conducted a wholesale and retail liquor, cigar, and tobacco business under the name of the Clarke Mercantile Company, for the bank's exclusive use and benefit, and that while doing so it made certain false and fraudulent representations to the business world concerning the amount that had been paid on the stock of the Mercantile Company, and concerning its assets and liabilities, whereby the appellees were deceived and induced to extend credit to that company. This charge appears to be based on the following facts, and is in the nature of a legal inference therefrom: When the Mercantile Company was formed, Clarke became, and so long as it was engaged in business continued to be, its president and chief managing officer. Such purchases and sales as were thereafter made by the company were made under his supervision and direction. He was actively engaged in controlling the daily business transactions of the company from the date of its organization until January 12, 1895, when the Mercantile Company sold its property and the good will of its business to the Colorado Mercantile Company. On the organization of the Mercantile Company, which appears to have taken place on May 26, 1893, 1,998 shares of stock were issued to Clarke, and 1 share each to Benjamin Harrison and John S. Fowler, who, together with Clarke, became the first board of directors. Clarke immediately transferred 1,988 shares of his

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stock to William B. Morrison, who was the appellant's assistant cashier, as collateral, to secure his individual indebtedness to the appellant bank, and that amount of stock thereafter stood in Morrison's name, with a notation upon the stock ledger that he held it as "trustee for collateral security." On September 21, 1893, William F. Dieter was elected a director of the Mercantile Company in place of Benjamin Harrison, who had resigned. Dieter thereafter served the company in the capacity of director and bookkeeper, he having been recommended for the latter situation to the president of the Mercantile Company by one of the directors of the appellant bank. On June 4, 1894, Morrison, who had then acquired in his own right the one share of stock originally issued to John S. Fowler, became a director of the Mercantile Company in lieu of said Fowler, but he does not appear to have taken an active part in the daily business transactions of the Mercantile Company, which were, in the main, conducted by Clarke, with the assistance of Dieter, the bookkeeper. On April 18, 1895, Morrison resigned from the board of directors, and his resignation was duly accepted. There is testimony in the record which tends to show that on or about June 10, 1893, Clarke stated, in substance, to a representative of R. G. Dun & Co., when he was requested to make a statement concerning the assets and liabilities of the Mercantile Company, that its total assets aggregated \$146,215.12; that the merchandise indebtedness which had been assumed by the company amounted to \$22,559.54; and that he (Clarke) owed individually \$76,500, which was secured by the hypothecation of his stock in the Mercantile Company. The testimony further shows that Dieter, the bookkeeper of the Mercantile Company, on March 30, 1894, handed to an agent of R. G. Dun & Co. another statement, showing that the total assets of the Mercantile Company at that time amounted to \$125,627.93, and its liabilities to \$10,000; but there is also evidence to the effect that the agent of R. G. Dun and Co., to whom the last-mentioned statement was furnished, well knew

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that the Mercantile Company was heavily indebted at the time to the appellant bank, and that such indebtedness had not been included in the aforesaid statement of its liabilities. While the evidence fully warrants the conclusion that the appellees were induced to credit the Mercantile Company on the strength of statements concerning its means and solvency that were circulated by various commercial agencies, and had been compiled from statements made by Clarke and Dieter, yet there is no evidence that such statements were made either by direction, or with the knowledge and sanction, of any of the managing officers of the appellant bank. The testimony further discloses that, after the Mercantile Company was formed, its business was generally conducted at a loss; that this was particularly the case in the season of 1894; that Clarke failed to induce certain parties, from whom he had been in the habit of purchasing goods, to buy a part of his stock in the Mercantile Company and become interested in its business, as he had hoped to do when the company was formed; that having failed in the latter project, and the company being in great financial stress, Clarke, on or about January 1, 1895, resolved to sell the stock in trade of the Mercantile Company and the good will of its business, if he could find a purchaser for the same at a fair price; that he succeeded in finding a purchaser, and conferred with the officers of the appellant bank, which was the largest creditor of the Mercantile Company, concerning the proposed sale, and was aided and assisted by them to a large extent in the negotiations, which culminated, on January 12, 1895, in a sale to the Colorado Mercantile Company of the property and assets of the Mercantile Company for the sum of \$50,000 in cash; and that the money so received by the Mercantile Company on the sale of its property and good will was deposited by it in the appellant bank, where it was applied, with the consent of the Mercantile Company, to the payment of its indebtedness to the appellant bank, which then amounted to about \$78,000, including the balance unpaid on the individual indebtedness of

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Clarke, which had been indorsed by the Mercantile Company on the organization of that concern. Prior to January 12, 1895, it seems that \$13,111 had been paid on Clarke's individual note of \$27,500, which had been indorsed by the Mercantile Company; that said note had been canceled, and the balance due thereon had been included in another note of \$25,000, which was drawn by the Mercantile Company and indorsed by Clarke. The note for \$50,000, originally made by Clarke and indorsed by the Mercantile Company, appears to have been wholly unpaid on January 12, 1895, except such sums as may have been paid thereon in the way of interest.

Such, in brief, are the material facts on which the claim is based that the appellant bank transacted business in the name of the Mercantile Company, for its exclusive use and benefit, and that the representations aforesaid concerning that company's assets and liabilities were in fact made by the bank, and that the bank should be held accountable therefor.

We are of opinion, however, that the claim in question is not well founded. The Mercantile Company was a distinct legal entity, subject at all times to the control of its own officers, and it is clear, we think, that it did not become an agent of the bank either because Clark hypothecated the bulk of its stock which he happened to own to secure a debt due to the bank, or because Morrison, an employee of the bank, served for a time on the board of directors of the Mercantile Company, or for both of these reasons combined. In a legal sense, a corporation does not become the agent of another, be it a corporation or an individual, because the latter holds a part of its stock in pledge to secure a debt; nor is the relation of principal and agent established, as between two corporations, because an officer or employee of one is a member of the board of directors of the other. It has even been held that, where the same person is acting as director in two corporations, knowledge acquired by him, while serving in the capacity of a director in one

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corporation, is not imputable to the other. *Thomp. Corp.* § 5214, and cases there cited. Moreover, while it may be conceded that one corporation may act as agent of another in a given transaction, or even in a series of transactions, yet we do not understand it to be possible, for a corporation which has been incorporated to carry on a given business, to transact the whole of that business merely as the agent of, and for the exclusive benefit of another. Ordinarily, a corporation is not even the agent of its own stockholders, in such a sense as to render them personally liable upon its contracts or for its wrongful or fraudulent acts, although its stockholders are entitled ultimately to the net profits realized from all corporate ventures ; and it would be a strange result if the acquisition of stock in a corporation by one of its creditors, to be held as collateral security, or if the election of one of the creditor's employees to serve on its board of directors, should be held to place the corporation in the attitude of a mere agent. Such a conclusion is totally inadmissible. It is doubtless true, Preference of
creditors. as has been suggested, that a large creditor of a corporation or of an individual, by virtue of being such, sometimes has such an influence over his debtor as enables him to control his actions in many ways ; but this is a moral power, incident to the situation, which the law permits a creditor to exercise for his own benefit and advantage, even at the expense of other creditors, provided that he does not direct the doing of acts that are either illegal or fraudulent. The existence of such an influence, however, falls far short of establishing the relation of principal and agent, even where it is plain that it does exist and has been exercised. In the case at bar, it is obvious that the bank counseled and advised the Mercantile Company, through Clarke, its president, to sell its property and effects, and to apply the proceeds of the sale on the company's indebtedness to the bank ; and it is very probable that the Mercantile Company was induced, to a large extent, by such advice to make the sale and such appropriation

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of the proceeds. But conceding this to have been the case, the transaction amounted to no more than a preference among creditors, all of whom had valid claims, and, considered by itself, we do not see that it gives the appellees any legal cause for complaint. It seems to be well settled in the state where the transaction took place, and in other jurisdictions as well, that a private business corporation, so long as it retains the custody and control of its property, may dispose of the same so as to pay the claims of one or more of its creditors, to the total exclusion of other equally meritorious claims, although it is at the time insolvent. In this respect a private business corporation has the same power to prefer creditors which is possessed by an individual. Its property and assets not being held in trust for equal distribution among all of its creditors, it may discriminate between them like a natural person, provided it pays honest debts and makes no distribution of its property among shareholders until all legal obligations to creditors have been discharged. *West v. Produce Co.*, 6 Colo. App. 467, 41 Pac. 829; *Burchinell v. Bennett* (Colo. App.) 52 Pac. 51; *Crymble v. Mulvaney*, 21 Colo. 203, 40 Pac. 499; *Sutton v. Dana*, 15 Colo. 98, 25 Pac. 90; *Gottlieb v. Miller*, 154 Ill. 44, 39 N. E. 992; *Henderson v. Trust Co.*, 143 Ind. 561, 40 N. E. 516; *Jewelry Co. v. Volfer*, 106 Ala. 205, 17 South. 525; *Hollins v. Iron Co.*, 150 U. S. 371, 382, 14 Sup. Ct. 127; *Railway v. Ham*, 114 U. S. 587, 5 Sup. Ct. 1081; *Graham v. Railroad Co.*, 102 U. S. 148, 160; *Fogg v. Blair*, 133 U. S. 534, 541, 10 Sup. Ct. 338; *Gould v. Railway Co.*, 52 Fed. 680.

In concluding the discussion on this branch of the case, it is proper to observe that if the charge was well founded that the appellant bank carried on business in the name of the Mercantile Company, and while doing so made false representations, which were productive of damage to the appellees, then it would follow that a court of law could afford adequate relief for the alleged wrong, and there would be no occasion for seeking relief in a court of equity.

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It is further urged that the decree of the lower court, compelling the bank to pay the appellee's claims out of the money which it received from the Mercantile Company on the sale of its property and good will, can be sustained upon the theory that the bank had a secret lien on the property of the Mercantile Company, or what was tantamount thereto, which was fraudulent as to its other creditors. This claim is based altogether on the state of facts heretofore detailed. It is said, in substance, that the bank held 1,988 shares of the stock of the Mercantile Company by a title which authorized it to vote the stock at all corporate meetings; that Morrison and Dieter, two of the directors of the Mercantile Company, while serving on its board, were subject at all times to the orders of the bank, and that by these means the bank had acquired a control over the Mercantile Company which was as obnoxious to the law as an unrecorded mortgage or bill of sale covering all of that company's property and assets.

We think, however, that it is an erroneous view that the bank had the right to vote the stock which stood in the name of Morrison on the books of the Mercantile Company. The testimony shows without contradiction that Clarke was the real owner of that stock, and that it had been placed in Morrison's name merely as collateral security for Clarke's indebtedness to the bank, without any agreement between Clarke and the bank that while it was so held it should be voted by the latter. Under these circumstances, the right to vote the stock depends upon a local statute of Colorado (1 Mill's Ann. St. Colo. §§ 495, 496), which is as follows:

Right to Vote
Pledged Stock.

"Sec. 495. No person holding stock in any corporation as executor, administrator, conservator, guardian, or trustee, and no person holding such stock as collateral security, shall be personally subject to any liability as stockholder of such corporation, but the person pledging such stock shall be considered as holding the same and shall be liable as a stockholder accordingly, and the estate and funds in the hands of such executor,

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administrator, conservator, guardian or trustee, shall be liable in like manner and to the same extent as the testator or intestate, or the ward, or person interested in such trust funds would have been if he had been living and had been competent to act and held the stock in his own name.

"Sec. 496. Every executor, administrator, conservator, guardian or trustee shall represent the stock in his hands at all meetings of any such corporations and may vote accordingly as a stockholder, and every person who shall pledge his stock may nevertheless represent the same at all meetings and vote accordingly."

Reading both of these sections together, the term "trustee," as used in section 496, means, we think, a person who holds the legal title to stock for the benefit of some third party, who is the equitable owner thereof, and entitled to the dividends thereon, and whose property, whether held in trust or otherwise, is chargeable with whatever liability may result from the ownership of the stock. Persons holding stock in trust for married women, minors, insane persons, spendthrifts, and the like would be included by the term "trustee," as used in section 496, *supra*; but a person in whose hands stock is placed by the real owner, to be held merely as collateral security for a debt due from himself to a third person, would not be so included. In cases of the latter sort, the stock involved is really held in pledge, and the right to vote the same, in the absence of an express agreement to the contrary, remains with the pledgor. *Brewster v. Hartley*, 37 Cal. 15-25. Such we understand to be the construction which has been placed upon the Colorado statute by the supreme court of that state, and similar views have been expressed elsewhere. *Miller v. Murray*, 17 Colo. 417, 30 Pac. 46; *Vowell v. Thompson*, 3 Cranch, C. C. 438, Fed. Cas. No. 17,023; *Hoppin v. Buffum*, 9 R. I. 513-518; *Allen v. Hill*, 16 Cal. 113; *Com. v. Dalzell*, 152 Pa. St. 217, 25 Atl. 535.

Concerning the charge that Morrison and Dieter, while serving on the board of directors of the Mercan-

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tile Company, were mere agents of the bank, we deem it sufficient to say: First, that both of these persons were duly qualified to serve as members of the board by their ownership, in their own right, of one share each of the stock of the Mercantile Company; and, in the second place, that we fail to find any evidence in the record which would justify a finding that Dieter was a special representative of the bank on the board of directors, and that he was unduly or unlawfully swayed by its influence. He was the bookkeeper of the Mercantile Company, and was employed for that purpose by its president. He devoted all of his time to its service, and was paid for his services by the company. In short, he bore no such relation to the bank as would indicate that it could or did control his actions in an unlawful manner. Indeed, when the facts of the case are fully analyzed, it will be found, we think, that the control which the bank exercised over the Mercantile Company was mainly due to the fact that it had made advances to the company and was its largest creditor. It was a moral influence, due to this circumstance, which the bank seems to have exerted over the Mercantile Company, rather than any legal power that it had acquired to control its actions or business policy. The directors of the Mercantile Company seem to have retained the power at all times to transact the corporate business as they deemed best, and two of them, at least (Clarke and Dieter), did not occupy such a relation to the bank as disabled them from exercising an independent judgment, or acting at all times as they thought proper.

We have already stated, in substance, that the evidence does not support the contention that the bank should be held responsible to the appellees for the statements which were made by Clarke and Dieter, relative to the financial condition of the Mercantile Company, and on this branch of the case it is proper to observe, further, that the testimony does not warrant the conclusion that the bank wrongfully concealed its relation as

Banks—Corporate
Debts—Public Ac-
tice.

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a creditor of the Mercantile Company, or resorted to any artifice to prevent such relation from becoming known. No statute of the state of Colorado, and no business usage of which we are aware, made it obligatory on the bank to give public notice of the amount of its claim against the Mercantile Company; and it goes without saying that, in the absence of such a statute, its full duty was discharged by refraining from making any false statements or spreading any false reports concerning the amount of such indebtedness. In point of fact, the existence of the debt, and the proximate amount thereof, was known to some of the appellees as early as March 22, 1894; since the evidence shows that on that day some of the appellees were furnished with a statement by Bradstreet's Commercial Agency, which contained the information that the Mercantile Company owed a local bank in Denver about \$60,000, and that the stock of the Mercantile Company was hypothecated to secure such indebtedness, and was virtually owned by the pledgee.

In view of these considerations, we are unable to discover any reasons which will warrant a ruling that the control which the bank exercised over the Mercantile Company was tantamount to a secret lien on its property and for that reason fraudulent. Such influence as it exercised over the Mercantile Company it had acquired by means which the law esteems lawful. It concealed no fact which the law required it to make known. Moreover, it had no legal power to control the corporation, since the majority of that company's directors were under no obligations to the bank which can be assumed to have rendered them unduly subservient to its wishes.

In support of the proposition which is now under consideration, the appellees have invited our special attention to the case of *American Oak-Leather Co. v. C. H. Fargo & Co.*, 77 Fed. 671, which seems to have controlled the action of the trial court in rendering a decree in favor of the appellees. In that case it appeared that an insolvent business corporation had executed judgment notes in favor of three of its credi-

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tors, and had agreed that it would not execute like notes in favor of any of its other creditors. To make the latter agreement effectual, and for no other purpose, its president and secretary and the majority of its directors resigned, and their places were filled by clerks of the attorneys for the favored creditors who had concocted the scheme. The corporation was thus left bound in the hands of the favored creditors who had been vested with power to make the potential liens actual liens at any moment. It was held, in substance, that judgment notes executed under such circumstances had all the vices of a secret lien. The facts disclosed by the present record, as heretofore detailed, are, in our judgment, materially different from those last recited. The bank held no obligation of the Mercantile Company which it could transform at will into an actual lien upon its property; neither did it have a like power to control the action of the debtor company. The result is that, if we give to the case cited its full weight, we fail to discover, in the facts upon which it was predicated, anything which will serve to alter the conclusions heretofore announced.

One further question affecting the jurisdiction of the trial court is presented by the record which deserves notice. Several of the appellees who intervened in the suit which was commenced by Paris, Allen & Co., and who became co-complainants after that suit was instituted, did not have claims against the Mercantile Company amounting to as much as \$2,000, exclusive of interest and costs, and with respect to those claims it is contended by the appellant that the circuit court did not have jurisdiction, although said claims had been severally reduced to judgment. The jurisdiction of the trial court over the action brought by Paris, Allen & Co. is conceded, since that firm had obtained a judgment against the Mercantile Company in the sum of \$3,249.42. The question, therefore, is not whether several judgment creditors whose claims are each less than \$2,000 can aggregate them and bring a joint suit for the purpose of maintaining a creditor's bill in the federal

Creditor's Bill
—Intervention.

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court, but the precise question at issue is whether certain judgment creditors whose judgments were each less than \$2,000 had the right to intervene after another creditor's bill had been filed in the federal court over which that court had undoubted jurisdiction. This question, we think, should be answered in the affirmative. The original bill was exhibited for the purpose of reaching a specific fund alleged to be in the hands of the appellant bank, and subjecting the same to the payment of judgments against the Mercantile Company on the theory that the bank had acquired the fund in fraud of the rights of creditors; and while it is true that the court ultimately rendered a money decree against the bank requiring it to pay specific sums of money to each of the several complainants, yet, in the progress of the case, it might have found it necessary to have appointed a receiver of the fund, or to have required its payment into court for the purpose of distribution. Had the property proceeded against been land or goods and chattels, it would probably have found it necessary to have appointed a receiver. The suit was clearly one to reach a specific fund, and subject it to the payment of debts of the Mercantile Company, and being a suit of that nature, the court in which such bill was first filed acquired the right to administer the fund without let or hindrance on the part of any other court, according to the principles announced by this court in the cases of *Merritt v. Barge Co.*, 49 U. S. App. 85, 93, 24 C. C. A. 530, and 79 Fed. 228, and *Gates v. Bucki*, 12 U. S. App. 69, 4 C. C. A. 116, and 53 Fed. 961. We think, therefore, that, after the original bill had been filed, and the fund proceeded against had thereby been brought within the jurisdiction of the court in such a sense that if it thought proper it could have taken the fund into its own custody, other judgment creditors had the right to intervene for the protection of their interests, even though their judgments were severally less than \$2,000. If they had been compelled to file bills in the courts of

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the state to reach the same fund and subject it to the payment of their judgments, such a course of procedure might eventually have led to a conflict of jurisdiction. Besides, we do not understand that the provision of the judiciary act limiting the right to sue to cases which exceed \$2,000, exclusive of interest and costs, has any application to cases like the one at bar, where a judgment creditor intervenes and becomes a party to a creditor's bill already filed, which was exhibited by a judgment creditor whose judgment exceeded the jurisdictional amount, and which was filed for his own benefit and for the benefit of others similarly situated who might come in and contribute to the expense of prosecuting the suit. The right of a judgment creditor to file a bill in behalf of himself and other judgment creditors who may elect to join in the proceeding and contribute to the expense, has been recognized from time immemorial by courts of equity, chiefly because such practice lessens litigation and is also convenient. It is hardly probable, therefore, that the provision of the judiciary act last referred to was intended to change the established practice so as to prevent a judgment creditor from intervening in a proceeding already brought to collect a judgment in excess of \$2,000, excluding interest and costs, if his own claim happened to be less than that sum. The cases, chiefly relied upon by the appellant's counsel to sustain a contrary view (*Gibson v. Shufeldt*, 122 U. S. 27, 7 Sup. Ct. 1066, *Seaver v. Bigelows*, 5 Wall. 208; *Ex parte Baltimore & O. R. Co.*, 106 U. S. 5, 1 Sup. Ct. 35; *Clay v. Field*, 138 U. S. 464, 479, 11 Sup. Ct. 419) are cases where the right of appeal to the supreme court was denied in consequence of the amount involved in the appeal, and, in our judgment, they are not in point on the question at issue. The objection to the jurisdiction of the trial court is accordingly overruled, but, as the decree appealed from was erroneous, the same will be reversed, and the cause will be remanded for further proceedings in accordance with this opinion.

Meyers v. New York County Nat. Bank

NOTES.

Right to Vote Pledged Stock.—When the stock stands in the pledgee's name on the books of the corporation, the pledgee, in the absence of restrictive statutes, has the right to vote thereon. *Brewster v. Hartley*, 37 Cal. 15; *In re Barker*, 6 Wend. (N. Y.) 509; *Ex parte Willcocks*, 7 Cow. (N. Y.) 402; *In re Mohawk, etc., R. Co.*, 19 Wend. (N. Y.) 135; *Vail v. Hamilton*, 85 N. Y. 453; *In re Empire City Bank*, 18 N. Y. 199; *Roosevelt v. Brown*, 11 N. Y. 148; *In re Long Island R. Co.*, 19 Wend. (N. Y.) 37; *Adderly v. Storm*, 6 Hill (N. Y.) 624; *Heath v. Silverthorn, etc., Co.*, 39 Wis. 147; *Pittsburgh R. Co. v. Stewart*, 41 Pa. St. 54; *Chase v. Merrimack Bank*, 19 Pick. (Mass.) 564; *Fisher v. Seligman*, 75 Mo. 13; *Griswold v. Seligman*, 72 Mo. 110; *Hoppin v. Buffum*, 9 R. I. 513; *Franklin Bank v. Commercial Bank*, 36 Ohio St. 350.

Same—Statutory Provisions.—In several States it is provided by statute that the pledgor may attend meetings and vote as stockholder, even though the stock stands in the name of the pledgee. The proof of the fact that the stock is pledged is also provided for. *New Hampshire*, G. L. 1878, p. 355, § 12; *Maine*, Acts 1873, ch. 69; *Washington*, Code 1881, § 2432; *Nevada*, C. L. 1872, ch. 2, § 3400; *Indiana*, Rev. Stat. 1881, § 3009; *Missouri*, Rev. Stat. 1879, § 714; *Maryland*, R. Code 1878, p. 316, § 13; *Wyoming*, C. S. 1876, ch. 34, § 17; *New Mexico*, G. L. 1880, p. 206, § 12; *New Mexico*, R. L. 1875, p. 622, § 12.

Same—When Standing in Pledgor's Name.—If, however, the certificate is only transferred in blank and the stock still stands in the pledgor's name on the books, the pledgor has the right to vote. *Becker v. Wells F. M. Co.*, 1 Fed. Rep. 276; *In re Barker*, 6 Wend. (N. Y.) 409; *Ex parte Willcocks*, 7 Com. (N. Y.) 402; *In re Cecil*, 36 How. Pr. (N. Y.) 477; *Strong v. Smith*, 15 Hun (N. Y.) 222; *Merchants' Bank v. Cook*, 4 Pick. (Mass.) 405; *McDaniels v. Flower Brick Mfg. Co.*, 22. Vt. 274.

MEYERS

v.

NEW YORK COUNTY NAT. BANK,

(*Supreme Court of New York, Appellate Division, Jan. 24, 1899.*)

Trust Funds Deposited in Personal Account.*—Where the trustee of an incompetent person deposits the trust funds in his personal bank account, and there is nothing to show that they are not the trustee's individual property, and the bank appropriates them, as a part of such account, to satisfy notes given to it by the trustee, the succeeding trustee cannot recover such funds in behalf of his ward's estate.

*See note at end of case.

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APPEAL by plaintiff from trial term. *Affirmed.*

Argued before GOODRICH, P. J., and CULLEN, BARTLETT, HATCH and WOODWARD, JJ.

Richard M. Henry (*John W. Weed*, on the brief), for appellant.

John M. Bowers (*L. G. Reed*, on the brief), for respondent.

CULLEN, J. John McLellan kept a deposit account with the defendant. He was appointed committee of the estate of Edward Crawford, an incompetent person. While such committee, he received moneys belonging to the estate of his ward, and deposited them in his personal bank account. During this period the defendant made two loans to McLellan of \$2,500 each, payable on demand. On April 19, 1892, there was to the credit of McLellan's account in the bank the sum of \$393.81, of which \$381.73 were the funds of the estate of his ward. On this day the defendant called the two loans of McLellan, and, on his failure to make payment, appropriated his whole deposit account towards the satisfaction of the notes. There was nothing in the character of the funds of the estate which were deposited in McLellan's account to give the bank any notice that they were other than McLellan's personal moneys, and at the time of closing the bank account and of the appropriation of the balance the defendant had no knowledge of the rights or equities of the estate of the incompetent. Subsequently, this present plaintiff was substituted as the committee of the incompetent, and he brought this action to recover that portion of McLellan's account which represented the funds of the estate.

The learned counsel for the appellant concedes the doctrine that money has no earmarks, and that, if McLellan had paid to the bank, on account of his debt to it, the deposit balance remaining to his credit, that balance, though it consisted of the moneys of the estate, misappropriated by McLellan, could not be recovered from the bank. *Justh v. Bank*, 56 N. Y. 478; *Stephens*

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v. Board, 79 N. Y. 183; Hatch v. Bank, 147 N. Y. 184, 41 N. E. 403. He contends, however, that this rule does not control the disposition of the present case, because McLellan did not pay over the moneys to the defendant, but the defendant appropriated them without any affirmative action on McLellan's part. I think the difference of fact on which the learned counsel for the appellant relies creates no difference in the principle applicable to the case. It is unnecessary to consider whether moneys of a third party, misappropriated by a depositor, and placed in his personal account, could be seized, on an attachment or otherwise, by an ordinary creditor of the depositor. The question here presented is different. True, McLellan gave the defendant at the time no authority to appropriate the deposit account to the payment of the notes, but he had previously given such authority. The existence of what is called a banker's lien is well recognized in commercial circles and by the law. "The rule may be broadly stated that the bank has a general lien on all moneys and funds of a depositor in its possession for the balance of the general account" (Morse, Banks, § 324), though the lien is only for accounts that are at the time due and payable (Jordan v. Bank, 74 N. Y. 467). "Ordinarily that [the lien] attaches in favor of the bank upon the securities and moneys of the customer deposited in the usual course of business for advances which are supposed to be made upon their credit. It attaches to such securities and funds, not only against the depositor, but against the unknown equities of all others in interest, unless modified or waived by some agreement, express or implied, or by conduct inconsistent with its assertion." National Bank v. Insurance Co., 104 U. S. 54. Such being the law and commercial usage, when a depositor opens an account in a bank that very act, in the absence of an agreement to the contrary, authorizes the appropriation of his deposit balance to any matured claims the bank may hold against him, the same as if he then executed an agreement in writing to that effect. This being so, we do

Note

not see how the present case can be distinguished in principle from that of *Hatch v. Bank*, *supra*. In the Hatch Case the bank held the deposit under a contract which authorized it to appropriate the deposit to the payment of all obligations and liabilities held by it, whether the liabilities were due or otherwise. It was held that when the bank appropriated the depositor's balance to its claims "it acted with the written consent and authority of the firm, as completely effectual and operative as if the debtors on that day had personally directed the application to be made." While the agreement in the Hatch Case gave the defendant greater rights than an ordinary banker's lien, that fact has no bearing on the doctrine, just quoted, that a previous authority to the bank to appropriate funds to the payment of a debt is the same in effect as an express direction given at the time of the appropriation. We do not mean to say that if the defendant, before action taken by it, had known of the equities of the estate now represented by the plaintiff, it could have appropriated the moneys in McLellan's account to the satisfaction of his personal debt. But we do hold that the appropriation by the bank of such balance, without knowledge of the equities of third parties, stands on the same footing as a payment to it of that balance by the check of the depositor, and cannot be recovered.

The judgment appealed from should be affirmed, with costs. All concur.

NOTE.

Appropriation of Trust Funds by Bank to Depositor's Debt.—The proposition that there is no right of offset against a trust deposit, nor any lien for the trustee's personal debts, is axiomatic. *Locke v. Prescott*, 32 Beav. 261; *Murray v. Pinkett*, 12 Cl. & F. 764; *National Bank v. Connecticut Mut. L. Ins. Co.*, 104 U. S. 54; *Union Stockyards Bank v. Gillespie*, 137 U. S. 411; *Bundy v. Monticello*, 84 Ind. 119; *Johnson v. Payne, etc., Bank*, 56 Mo. App. 257; *Clark v. Harrisonville First Nat. Bank*, 57 Mo. App. 277; *St. Paul Third Nat. Bank v. Stillwater Gas Co.*, 36 Minn. 75.

In *Burnett v. Corunna First Nat. Bank*, 38 Mich. 630, it was held that where a trustee or agent deposits his principal's money in his

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own name in a bank to which he is indebted, and the bank has applied it to the debt without authority, and in ignorance of the real ownership of the fund, the principal, or actual, owner may reclaim the fund if it can be traced and identified.

But in *Wood v. Boylston Nat. Bank*, 129 Mass. 358, 37 Am. Rep. 366, an attorney indebted to a bank deposited a negotiable promissory note that had been intrusted to him for collection, and gave the bank no information as to whose account it was to be collected for. The bank collected the note, and credited the attorney's account with the proceeds, applying a portion thereof to the payment of the attorney's indebtedness. In an action brought by the owner of the note, as soon as he learned of the bank's conduct, it was held that no recovery could be had.

And it was held in a recent *English* case that a bank, with which a check known to it to be the proceeds of shares is deposited by a broker to the credit of his individual account, is entitled to retain the money in discharge of an overdraft due it from the broker, although the check represented the proceeds of shares sold by him for certain clients under directions to deposit the proceeds in other banks in their names, and the bank made no inquiry as to whether the money was in his hands as agent or otherwise. *Thomson v. Clydesdale Bank* [1893], App. Cas. 282.

ANDREWS

v.

STEELE CITY BANK *et al.*

(*Supreme Court of Nebraska, Dec. 8, 1898.*)

Authority of Receiver—Collateral Attack.*—When court of competent jurisdiction has appointed a receiver in an action where such appointment is authorized, the authority of such receiver is not open to collateral attack.

Intervention.—A receiver of a corporation, appointed after the commencement of a suit against the corporation, may intervene in such action to defend the rights of the corporation.

Insolvent Bank—Assets in Custody of Examiner—Attachment.*—Under the present banking law (Comp. St. c. 8), when an examiner, under authority of the banking board, has taken possession of the assets of an insolvent bank, such assets are not subject to attachment at the suit of a creditor of the bank while possession is so retained.

(Syllabus by the Court.)

*See notes at end of case.

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ERROR by plaintiff to Jefferson county district court. *Affirmed.*

John C. Hartigan, for plaintiff in error.

E. H. Hinshaw, for defendants in error.

IRVIN, C. Charles C. Andrews brought an action against the Steele City Bank, Charles B. Rice, and Vena Rice, alleging that he was a depositor in the bank, which had become insolvent, and was placed in the custody of the state banking board; Case Stated. that the Rices, who were husband and wife, were the sole stockholders of the bank, and had given a bond to pay the debts of the bank, and had taken possession of its assets. Judgment was prayed for \$1,000. Plaintiff also sued out a writ of attachment, alleging every statutory ground except that the debt was fraudulently contracted. The attachment was levied on certain property, both personal and real. Thereafter Henry W. Challis obtained leave to intervene, alleging that he had become the receiver of the bank. He filed an answer, and also moved to discharge the attachment. This motion was sustained, and from the order discharging the attachment plaintiff prosecutes proceedings in error.

An attack is made on the validity of Challis' appointment as receiver, and upon his right to intervene. It appears that the banking board, pursuant to the proviso of section 35 of the banking act (Comp. St. c. 8), authorized the stockholders to take possession of the bank and its assets on giving a bond to settle the liabilities; that a bond was tendered and approved; that thereafter the board undertook to rescind its action, and directed the attorney general to apply for a receiver. Such application was made, and Challis appointed. It is argued that the board, after approving the bond, had no authority to rescind its action. But, if this be so, it would affect only the propriety of the appointment, and not its validity. The appointment was made by a court of competent jurisdiction, and in an action where

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the power to appoint existed. That is sufficient to protect the receiver's authority from collateral attack. We have no doubt of the receiver's right to become a party. The bank was sued before his appointment. He became, by operation of law, its transferee. By section 45 of the Code of Civil Procedure, where a transfer of interest occurs otherwise than by death, marriage, or disability, the action may either proceed in the name of the original party, or the successor in interest may be substituted. By section 50a, any person who claims an interest in the success of either party may become a party by intervention.

The receiver had an interest in the success of the bank, and he had a right to come in to defend that interest. *Arnold v. Weimer*, 40 Neb. 216, 58 N. W. 709. From the briefs it would seem that the plaintiff considers that dissolution of the attachment was sought simply on the ground that the attached property belonged to the bank, and was attached as the property of Rice. The record does not support that theory. The ownership of the property was only incidentally involved, and the ruling on the motion does not necessarily adjudicate that question. The attachment was asked and issued against all defendants. There is nothing in the affidavit, writ, or return to indicate that the property was seized as that of one defendant rather than the other. While the evidence shows that Rice had formerly held the legal title to at least a portion of the property, it also shows that he held it as trustee for the bank. Certainly, the receiver had a right to resist the attachment in so far as the bank's title was attacked.

The plaintiff insists that when the banking board approved the bond the bank became the property of the obligors, as did all its assets, and so subject to attachment; that Rice had absconded; that before leaving he had conveyed the attached property to persons named as trustees for creditors; that this was a prohibited general assignment, and was, consequently, fraudulent. It is

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apparent that the decision of the district court did not involve a decision of these issues, but went upon the ground that the property was not subject to attachment. The evidence, while on some points conflicting, tends to show that the Rices' bond was approved November 11, 1895, but that they straightway refused to take possession of the assets. The attachment was levied November 16th. November 18th the board undertook to rescind its action, and applied for a receiver. Prior to November 11th, an examiner, by direction of the board, had taken possession of the bank and all its assets. He did not surrender possession to Rice, but retained possession for the board until the receiver qualified, when he delivered possession to him. Under the former banking act it was held that the assets of an insolvent bank were subject to attachment while in the hands of the banking board, and before a receiver was appointed, or the sheriff placed in custody. *Arnold v. Weimer*, 40 Neb. 216, 58 N. W. 709. After the decision of that case, and before the present arose, a new law went into effect (Comp. St. c. 8), section 24 of which gives authority to an examiner, when ordered by the board, to take possession of a bank, and "to hold and retain possession of all the money, rights, credits, assets, and property of any description belonging to such bank, as against any *mesne* or final process issued by any court against such bank, corporation, partnership, firm, or individual whose property has been taken possession of by such examiner, until the state banking board can receive and act on the report made by the examiner of said bank, and have a receiver appointed, as provided in section 35 of this act." By this provision, when an examiner, duly authorized, takes possession, the assets pass into the custody of the state, and are no longer subject to attachment. Whether the bond became obligatory upon approval, whether the bank's assets thereby passed to the obligors, whether such result could be defeated by the obligors' refusing to take possession or by a subsequent rescission by the board of its approval of the bond, are questions which

Notes

may, perhaps, arise on the trial of the main case, but do not affect the present motion. The property was in fact in the possession of the examiner, and under the protection of the statute. Although, perhaps, that possession ought to have terminated, it had not in fact done so. It could not be disregarded. Affirmed.

NOTES.

Receivers—Validity of Appointment—Collateral Attack.—The receiver's title cannot be attacked on the ground that his appointment is illegal, so long as there is a subsisting order appointing him. Parties dissatisfied must apply to the court itself to question the validity of the appointment, and will not be permitted to interfere collaterally. *Russell v. East Anglian R. Co.*, 3 M. & G. 104; *Ames v. Birkenhead Docks*, 20 Beav. 332; *Woodward v. Earl of Lincoln*, 3 Swanst. 626; *Cook v. Citizen's Nat. Bank*, 73 Ind. 256; *Richards v. People*, 81 Ill. 551; *Howard v. Palmer, Walk.* (Mich.) 391; *American Bank v. Cooper*, 54 Me. 438; *People v. Sturtevant*, 9 N. Y. 263, 59 Am. Dec. 536; *Sullivan v. Judah*, 4 Paige (N. Y.) 444; *Moat v. Holbein*, 2 Edw. Ch. (N. Y.) 188; *Richards v. West*, 3 N. J. Eq. 456; *Basting v. Ankeny* (Minn.), 3 Am. & Eng. Corp. Cas., N. S., 200.

If the court had jurisdiction of the subject-matter, the validity of an appointment of a receiver by it who has duly qualified cannot be questioned in an action brought by him. *Davis, Receiver, etc., v. Shearer et al.*, 90 Wisconsin 250, 2 Am. & Eng. Corp. Cas., N. S., 384.

In *Russell v. East Anglian R. Co.*, 3 M. & G. 104, Lord Truro says: "It is not open to any party to question the orders of this court, or any process sued under the authority of this court, by disobedience. I know of no act which this court may do, which may not be questioned in proper form, and on a proper application; but I am of opinion that it is not competent for anyone to interfere with the possession of a receiver, or to disobey an injunction, or any other order of the court, on the ground that such orders were improvidently made. Parties may take a proper course to question their validity, but while they exist they must be obeyed."

Nor can defendants who have fully and completely recognized a receiver as legally appointed question, in a collateral proceeding, the legality of such appointment. *Skinner v. Lucas*, 68 Mich. 432. See also *Burton v. Schilbach*, 45 Mich. 513. Against collateral questioning of appointment claimed to be void, see *Connor v. Bray*, 83 Ala. 217.

But in *People ex rel. Wright v. Weigley*, 155 Ill. 491, 2 Am. & Eng. Corp. Cas., N. S., 229, it was held that a decree appointing a receiver, if absolutely void, is open to collateral attack upon a proceeding for contempt because of the disobedience of the mandate of such decree.

Attachment—Assets in Custody of State.—It may be stated as a general rule that property or money in the custody of the law cannot be attached.—*United States*.—*Turner v. Fendall*, 1 Cranch (U. S.) 117; *Perego v. Bonesteel*, 5 Biss. (U. S.) 66; *Naumburg v. Hyatt*, 24 Fed. Rep. 898.

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California.—Clymer v. Willis, 3 Cal. 363, 58 Am. Dec. 414.

Illinois.—Reddick v. Smith, 4 Ill. 451; Lightner v. Steinagel, 33 Ill. 513, 85 Am. Dec. 292. See also Pierce v. Carleton, 12 Ill. 358, 54 Am. Dec. 405.

Iowa.—Hamilton Brown Shoe Co. v. Mercer, 84 Iowa 537, 35 Am. St. Rep. 331.

Kansas.—McKinney v. Purcell, 28 Kan. 446.

Maryland.—Glenn v. Gill, 2 Md. 18; Farmers Bank v. Beaton, 7 Gill & J. (Md.) 421, 28 Am. Dec. 226. See also McPherson v. Snowden, 19 Md. 233; Groome v. Lewis, 23 Md. 152, 87 Am. Dec. 563.

Massachusetts.—Wilder v. Bailey, 3 Mass. 289; Pollard v. Ross, 5 Mass. 319; Vinton v. Bradford, 13 Mass. 114, 7 Am. Dec. 119; Thompson v. Brown, 17 Pick. (Mass.), 462. See also Watson v. Todd, 5 Mass. 271.

Minnesota.—St. Paul Second Nat. Bank v. Schrauck, 43 Minn. 38.

New York.—Benson v. Berry, 55 Barb. (N. Y.) 620. See also Dunlop v. Patterson F. Ins. Co., 74 N. Y. 145, 30 Am. Rep. 283; Wehle v. Conner, 83 N. Y. 231.

North Carolina.—Alston v. Clay, 2 Hayw. (N. Car.) 171.

Ohio.—Dawson v. Holcomb, 1 Ohio (pt. 2) 275, 13 Am. Dec. 618; Davidson v. Kuhn, 1 Disney (Ohio) 405.

South Carolina.—Young v. Young, 2 Hill L. (S. Car.) 426; McKenzie v. Noble, 13 Rich. L. (S. Car.) 147. See also Roddey v. Erwin, 31 S. Car. 36.

Tennessee.—Drane v. McGabock, 7 Humph. (Tenn.) 132.

Texas.—Scott v. McDaniel, 67 Tex. 315.

Vermont.—Prentiss v. Bliss, 4 Vt. 513, 24 Am. Dec. 631.

UNITED STATES NAT. BANK OF NEW YORK

v.

VENNER.

(*Supreme Judicial Court of Massachusetts, Jan. 7, 1899.*)

Action on Judgment—Identity of Plaintiff—Variance.*—In an action on a judgment recovered in the state of New York, the writ described the plaintiff as the United States National Bank of New York, whereas the judgment was in favor of the "United States National Bank"; but the complaint set forth that plaintiff was duly incorporated under the "National Bank Act," and carrying on business in the city of New York as a national bank, and plaintiff's evidence tended to show its identity with the bank which recovered the judgment, and that there was no other bank in New York having the same or a similar name, and defendant put in no evidence. *Held*, that even if the writ was construed as setting forth plaintiff's title, there was no material variance, and the trial court was warranted in finding that plaintiff was the same plaintiff that recovered the judgment declared on.

*See note at end of case.

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EXCEPTIONS by defendant from Suffolk county superior court. *Exceptions overruled.*

F. Dodge and *C. Walcott*, for plaintiff.

C. F. Choate, Jr., and *A. F. Clark*, for defendant.

LATHROP, J. The writ in this case describes the plaintiff as the United States National Bank of New York, N. Y., a banking association or corporation duly established by law, being duly organized and incorporated under the laws of the United States of America, and having its usual place of business in the city and state of New York. The declaration is as follows: "And the plaintiff says that by the consideration of the supreme court of the state of New York held at New York for the city and county of New York, in said state of New York, on the 7th day of January, 1897, it duly recovered judgment against the defendant for \$7,428.25 debt or damage, together with \$1,221.95 interest, and cost of suit, taxed at \$118.40, amounting in all to \$8,768.60; that said judgment had never been vacated, set aside, or satisfied, and now remains in full force and effect, as appears from the records of said court, and the defendant owes it the amount of said judgment, with interest." The answer was a general denial. There was also filed by the defendant a special demand for proof "of the incorporation of the United States National Bank of New York, N. Y., plaintiff." At the trial the plaintiff put in evidence certified copies from the comptroller of the currency of its articles of association, its organization certificate, and the certificate authorizing it to do business. These documents showed the incorporation and existence of a national bank under the name of "The United States National Bank of the City of New York." The plaintiff put in evidence the judgment roll of the supreme court of New York, duly authenticated as required by Pub. St. c. 169, § 67, and Rev. St. U. S. § 905. The plaintiff also put in evidence tending to prove the identity of the bank that recovered the judgment with the plaintiff in this action, and

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evidence tending to show that there was not in New York any other bank having the same or a similar name. The defendant put in no evidence and asked the judge to rule that the plaintiff could not recover. The judge refused so to rule, and found for the plaintiff.

The only ground urged by the defendant in this court in favor of his request for a ruling is that there is a variance between the allegation and the proof, in that the writ describes the plaintiff as the United States National Bank of New York, whereas the judgment was in favor of the "United States National Bank." But an examination of the judgment roll shows that while the judgment was rendered in favor of "The United States National Bank," called in one place in the roll the "United States National Bank," the complaint sets forth that the plaintiff is "an association or corporation duly organized and existing under the act of congress of the United States known as the 'National Bank Act,' and carrying on business in the city of New York as a national bank." We are of opinion that there is no merit in the defense. If the defect had been specifically pointed out in the superior court, the writ could have been amended by setting forth with accuracy the name of the plaintiff, and by alleging in the declaration that the plaintiff recovered judgment in the name of the United States National Bank. And, if we considered it necessary that this should be done, we should not send the case back for a new trial, as the amendment could be made in the superior court at any time before judgment. *Cleaves v. Lord*, 3 Gray, 66; *Nichols v. Prince*, 8 Allen, 404, 408; *Denham v. Bryant*, 139 Mass. 110, 112, 28 N. E. 691. It is obvious, however, that the words in the writ in the present action, "of New York, N. Y.," do not necessarily import to be a part of the plaintiff's name, but may be considered as descriptive only. If so, there is no variance. *Thatcher v. Bank*, 19 Mich. 196. But if the words "of New York, N. Y.," are considered as part of the title of the bank, we are of

Note

opinion that no material variance is shown. In *Bank v. Lee*, 112 Mass. 521, the writ described the plaintiff as "the Washington County National Bank, a corporation duly established by law, and doing business in Greenwich, in the state of New York." To prove its corporate existence, it put in evidence an organization certificate of "the Washington County National Bank of Greenwich," to be located in the town of Greenwich, county of Washington, and state of New York, and a certificate of the comptroller of the currency that "the Washington County National Bank of Greenwich in the county of Washington and the state of New York," had been duly organized. It was contended that on account of the variance of name there was no proof of the organization of the plaintiff as a corporation. But it was held that, "in absence of evidence that there was any other bank of that name at that place, the evidence introduced warranted the inference that the organization proved was that of the plaintiff corporation." See, also, *Thatcher v. Bank*, *ubi supra*. The question before the court in the case at bar was whether the plaintiff in this action was the same plaintiff that recovered the judgment declared on. There can be no doubt that the judge was amply warranted in finding that it was.

Exceptions overruled.

NOTE.

Variance in Corporate Name in Judgments.—Corporate names are no exception to the general rule applied to natural persons: that names, with other circumstances, are facts from which identity can be presumed or established; and where a judgment is rendered against a corporation by one name, and execution issued upon that judgment under a different name, if both names are in fact applied to the same corporation, the apparent difference between the two names may be explained and harmonized by extrinsic evidence. *Talbot v. Hale*. 72 Ind. 1.

But if the name of the corporation is mistaken, materially and substantially, the corporation cannot be affected by the proceedings, and the test seems to lie in the distinction made between a variance in words and syllables only and a variance in substance. If a corporation is sued by a name varying only in words and syllables, and not in substance, from the true name, the misnomer must be pleaded

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in abatement. *Wilson v. Baker*, 52 Iowa 423. See also *Burnham v. Savings Bank*, 5 N. H. 446; *Sunapee v. Eastman*, 32 N. H. 470; *Lafayette Ins. Co. v. French*, 18 How. (U. S.) 404; *Lehman v. Warner*, 61 Ala. 455; *Medway Cotton Manufactory v. Adams*, 10 Mass. 360; *African Society v. Varick*, 13 Johns. (N. Y.) 38.

But if the name be mistaken in substance, the suit cannot be regarded as against the corporation. *Gilbert v. Nantucket Bank*, 5 Mass. 97; *Com. v. Dedham*, 16 Mass. 141; *Medway Cotton Manufactory v. Adams*, 10 Mass. 360; *Society for Propagating the Gospel v. Young*, 2 N. H. 310; *Bank of Utica v. Smalley*, 2 Cow. (N. Y.) 770, 14 Am. Dec. 526.

CITIZENS' BANK OF MOUND CITY *et al.*

v.

STATE *ex rel.* ATTORNEY GENERAL *et al.**(Court of Appeals of Kansas, Sept. 22, 1898.)*

Banks — Insolvency — Distribution — Statutory Provisions.*—The rule declared in *Bank v. Branch*, 45 Pac. 88, 57 Kan. 27, as governing proof of claims by and dividends to creditors of an assigned corporate estate, where such creditors held notes negotiated and guarantied by the corporation, and secured by mortgages on real estate (that is, that dividends should be paid out upon the amount remaining unpaid upon such claims after such creditors should have exhausted their special liens), is here *held* controlling in respect to the distribution of the estate of an insolvent banking corporation in the hands of a receiver appointed under the provisions of the state banking law.

(Syllabus by the Court.)

ERROR by receiver from Linn county district court.
Reversed.

John W. Poore, for plaintiff in error.

Stebbins & Evans, for defendants in error.

MILTON, J. The proceedings of the trial court were upon an agreed statement of facts, in substance as follows: "On July 19, 1893, in a suit brought by the attorney general, a receiver was appointed by the district court of Linn county to wind up the affairs of the Citizens' Bank of Mound City, Kansas; the bank

*See notes at end of case.

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being insolvent. A. G. Seaman was duly appointed receiver, and immediately thereafter took charge of the affairs and assets of the bank. While the bank was a going concern, Milton F. Mitchell had received from it collateral notes amounting to \$1,044.16 to secure his deposit of \$1,375.68. On February 6, 1894, Mitchell presented his claim upon his certificate of deposit to the receiver for allowance, and the same was thereupon allowed in full. Three days later Mitchell reported to the receiver that he had collected from the collateral notes held by him the sum of \$1,089.16, and had applied it upon his claim against the bank. In November, 1893, the receiver declared and paid out a dividend of ten per cent., and in April, 1894, he declared and paid another dividend of five per cent., but paid no part of either of the dividends to Mitchell, and refused to pay any dividend to him. On June 14, 1894, Mitchell filed a motion asking the court to order the receiver to pay fifteen per cent. upon his claim as allowed; and three days later the court heard the motion, and granted the order as prayed for. The receiver, for himself and on behalf of the unsecured creditors of the bank, brings these proceedings for a review of said order." The question for decision is whether the defendant in error is entitled to dividends upon the whole amount of his claim as proven and allowed, irrespective of the collateral security held by him. Upon this question the courts of the various states are somewhat unequally divided, a majority maintaining the affirmative position. An examination of the authorities indicates that the rule applicable to the distribution of an estate assigned for the benefit of the creditors of an insolvent govern in the distribution of the estate of an insolvent corporation in the hands of a receiver. Probably the most exhaustive consideration of the question herein involved to be found in any one case is given in the opinion of the United States circuit court of appeals in the case of *Bank v. Armstrong*, 8 C. C. A. 155, 59 Fed. 372, in which it was held that the claims of creditors of an insolvent national bank cannot be

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reduced by any credit for collections from collateral made after the declared insolvency of the bank, whether before or after proof of claims. An interesting case holding the opposite view is that of *State v. Nebraska Sav. Bank* (Neb.) 58 N. W. 976,—a case arising under the provisions of the banking law of that state. The supreme court of this state seems to have adopted what might be denominated the minority view, in the case of *Bank v. Branch*, 57 Kan. 27, 45 Pac. 88. In the opinion the court said: "The assets of the estate should be distributed upon equitable principles, and it is a recognized rule of equity that where there are two funds to which a creditor can resort, and other creditors are limited to one of them, the former will be compelled to exhaust the fund upon which he has an exclusive lien, and will be permitted to resort to the other for the deficiency only. *Burnham v. bank*, 55 Kan. 545, 40 Pac. 912; *Gore v. Royse*, 56 Kan. 771, 44 Pac. 1053; *Wurtz v. Hart*, 13 Iowa, 515; *In re Knowles* 13 R. I. 90; *Besley v. Lawrence*, 11 Paige, 581. While the assignee allowed the claims of those who held the guarantied mortgage bonds to the full amount, payment of a part of the debt will certainly be realized from the mortgage security. It would be inequitable to allow those claimants a *pro rata* dividend on the whole amount of their claim, when payment of part, if not all, of it may be received from the mortgage securities to which they have exclusive right." Also: "A distribution may be made among those holding the mortgage securities when they have exhausted their liens, and then dividends should be declared upon the amount remaining unpaid, and not upon the full amount of the claims as allowed." In a later case (*Security Inv. Co. v. Richmond Nat. Bank*, 58 Kan. 414, 49 Pac. 521) the doctrine declared in the preceding case was expressly adopted and approved. In the light of these two cases, it appears that the decision of the trial court was erroneous. It will therefore be reversed, and the cause remanded for further proceedings.

NOTES

DIVIDENDS OF SECURED CREDITORS.

(1). **General Rule.**—The prevailing, though not the universal, rule is that a secured creditor may prove and receive a dividend on his whole debt without regard to his special security for the whole or a part of his debt. *People v. Remington*, 121 N. Y. 328. *Citing* Story Eq. Jur., § 524; *In re Bates*, 118 Ill. 524, 59 Am. Rep. 383; *West v. Rutland Bank*, 19 Vt. 463; *Moses v. Ranlet*, 2 N. H. 488; *Findlay v. Hosmer*, 2 Conn. 350; *Logan v. Anderson*, 18 B. Mon. (Ky.) 114. See also *Matter of Ives*, 25 App. N. Cas. (N. Y. Supreme Ct.) 63; *Murray v. Hutcheson*, 8 App. N. Cas. (N. Y. C. Pl.) 423; *Detroit Third Nat. Bank v. Haug*, 82 Mich. 607; *Southern Michigan Nat. Bank v. Byles*, 67 Mich. 296; *Morris v. Olwine*, 22 Pa. St. 441; *Patten's Appeal*, 45 Pa. St. 151, 84 Am. Dec. 479; *Brough's Estate*, 71 Pa. St. 460; *Graeff's Appeal*, 79 Pa. St. 146; *Keim's Appeal*, 27 Pa. St. 42; *Miller's Appeal*, 35 Pa. St. 481; *In re Bates*, 118 Ill. 524, 59 Am. Rep. 383; *Furness v. Union Nat. Bank*, 147 Ill. 570; *Levy v. Chicago Nat. Bank*, 57 Ill. App. 143; *Kauffman v. Hudson*, 65 Tex. 716; *Atlantic Phosphate Co. v. Law* (S. Car. 1896), 23 S. E. Rep. 955; *Greene v. Jackson Bank*, 18 R. I. 779, *following* *Allen v. Danielson*, 15 R. I. 480, which *overruled* *Knowles' Petition*, 13 R. I. 90.

If a creditor has two separate demands against the assigned estate, one secured by first mortgage and the other by second mortgage, and he is paid in full the debt secured by the prior lien out of the proceeds of the mortgaged property, he will not be entitled to a dividend on both of his claims, though they are allowed as a single demand, but only to a dividend on the debt not so paid. By the payment of the first debt in full it is extinguished, and no dividend will be made on it in favor of the creditor to apply on his second claim. *Peoria First Nat. Bank v. Commercial Nat. Bank*, 151 Ill. 308.

(2.) **Minority Rule.**—In accordance with the practice in bankruptcy proceedings the rule in Maryland, and some other states, is that a creditor of an insolvent, who holds a collateral security, must either surrender the collateral, or have its value determined by the court, and his claim will be allowed for the difference between its amount and the value of the collateral.

Maryland.—*National Union Bank v. National Mechanics' Bank*, 80 Md. 371, 45 Am. St. Rep. 350, where BOYD, J. said: "The value of the securities thus held should be ascertained and credited on the claim before distribution is made. That can be easily done by relevant testimony, taken under authority of the court, when no sale has taken place. This was the practice in bankruptcy proceedings, and is not without precedent in other courts. See *In re Bridgman*, 4 Fed. Cas. No. 1866, 1 N. B. R. 312; *Amory v. Francis*, 16 Mass. 308; *Farnum v. Boutelle*, 13 Met. (Mass.) 159."

Iowa.—In Iowa a creditor, under an assignment, who has special security, may be required by the other creditors to resort to this, and can claim a dividend only on the balance after exhausting the property on which he has a special lien. *Wurtz v. Hart*, 13 Iowa 515, WRIGHT, J. saying: "Or the rule may be stated thus, that if a creditor has two funds, out of which he may make his debt, he may be required to resort to that fund upon which another creditor has no lien." See also *Dickson v. Chorn*, 6 Iowa 19, 71 Am. Dec. 382.

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Where an assignee for the purpose of obtaining possession of certain collateral securities held by a creditor, paid to him the full amount of his claim more than a year before it became due, under an agreement that there should be no rebate of interest on account of such advance payment, it was held that the assignee could not afterwards recover of said creditor the unearned interest on said claim which had been paid by his assignor before the assignment. *Satterlee v. Kirby*, 86 Iowa 518.

Massachusetts.—Where a debtor who has mortgaged personal property to secure a debt, dies insolvent, the mortgagee cannot prove his debt in full, unless he first waives his mortgage, but if he applies the amount of the mortgaged property towards the discharge of his claim, and a balance is left unpaid, he may prove such a balance before the commissioners. *Farnum v. Boutelle*, 13 Met. (Mass.) 159, *cited and relied upon in* *Merchants' Nat. Bank v. Eastern R. Co.*, 124 Mass. 524.

California.—Under the California Act of 1895, a secured creditor can prove his claim only for the balance after deducting the value of his security, or he may release his security to the assignee and prove his whole debt.

Minnesota.—The statute of this state requires the secured creditor to first exhaust his security, or release it to the assignee. Rev. Stat. 1881, c. 41, § 28.

And where, between the time of the assignment and the time of payment by a trustee, a creditor has realized on collaterals, the amount so realized must be deducted in fixing the amount to which he is entitled by way of dividend. *Baltimore Third Nat. Bank v. Lanahan*, 66 Md. 461. And see *Hall v. Farmers' Nat. Bank*, 53 Md. 120.

FIRST NAT. BANK OF GRAND FORKS, N. D.

v.

ANDERSON.

(*Supreme Court of the United States, Jan. 23, 1899.*)

Action against National Bank—Federal Jurisdiction.—Notes secured by a mortgage had been indorsed, and the mortgage assigned to the defendant national bank, as collateral security for a loan, and plaintiff had authorized the bank to sell the notes to a third party, take up the loan, and remit the balance; but, instead of doing this, the bank had undertaken to purchase the notes itself, and had not accounted for their value. In an action against the bank to recover the value of the notes, it was held by the state court that it was not an *ultra vires* act on the part of the bank to undertake to sell the notes as defendant's agent, and that if it was guilty of conversion plaintiff could recover. *Held*, on motion to dismiss a writ of error to revise a judgment of the state court, that the contention that no federal

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question was involved, because such judgment rested on two grounds, one of which was broad enough in itself to sustain the judgment and involved no federal question, was without merit.

Same—Conversion—*Ultra Virgs.**—The bank was liable for the value of the notes as for a conversion, even though it was not within its powers to sell them as the owner's agent.

ERROR by defendant to the Supreme Court of the State of North Dakota. *Affirmed.*

Burke Corbet, for plaintiff in error.

Henry W. Phelps, for defendant in error.

MR. CHIEF JUSTICE FULLER delivered the opinion of the court.

This was an action at law brought by Anderson against the First National Bank of Grand Forks, N.

Case Stated. D., in the district court for the first judicial district of North Dakota, to recover the balance of the value of certain notes belonging to Anderson, which he alleged the bank had converted.

The notes amounted to \$7,000, secured by mortgage, and had been indorsed, and the mortgage assigned, to the bank as collateral security for a loan of \$2,000, and Anderson had authorized the bank to sell the notes to a third party, take up the loan, and remit the balance. But, instead of doing this, the bank, according to Anderson, had undertaken to purchase the notes itself, and had not accounted for their value.

The cause was tried four times, and four times carried to the supreme court of North Dakota. 4 N. D. 182, 59 N. W. 1029; 5 N. D. 80, 64 N. W. 114; 5 N. D. 451, 67 N. W. 821; 6 N. D. 497, 72 N. W. 916. On the fourth appeal, a judgment in favor of Anderson was affirmed by the supreme court, and this writ of error to revise it was allowed, which defendant in error now moves to dismiss, or, if that motion is not sustained, that the judgment be affirmed.

By exceptions to the admission of certain testimony taken on the trial, and by the assignment of errors in the supreme court, plaintiff in error raised the point

*See note at end of case.

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that, under the statutes of the United States in respect of national banks, it was not within its power to become the agent of defendant in error to sell the notes in question to a third person, and not within the power of its cashier, who conducted the transaction, to bind the bank by such contract of agency.

On the third appeal (5 N. D. 451, 67 N. W. 821), the supreme court ruled that "when a national bank holds notes of its debtor as collateral to his indebtedness to the bank, it may lawfully act as agent for him in the sale of such notes to a third person, such agency being merely incidental to the exercise of its conceded power to collect the claim out of such collateral notes"; but, further, that, even though the act of agency were *ultra vires*, yet if the bank, instead of selling the notes to a third person, had, without the owner's knowledge, sold them to itself, it would be guilty of conversion, and could be held responsible therefor. As to the cashier, the court held that, on the pleadings and facts in the case, his act was the act of the bank.

The supreme court, in its opinion on the fourth appeal (6 N. D. 497, 509, 72 N. W. 916), among other things, said: "The question of *ultra vires* has been already discussed in a previous opinion. See 5 N. D. 451, 67 N. W. 821. We have nothing to add on that point. The recent decision of the federal supreme court cited by counsel for appellant (Bank v. Kennedy, 167 U. S. 362, 17 Sup. Ct. 831) does not appear to us to call for any change of our former ruling on this question. What we said in our opinion on the third appeal, on the subject of the authority of the cashier to bind the defendant by creating the relation of principal and agent between plaintiff and defendant, is still applicable to the case on the record now before us. In its answer and the brief of its counsel, the defendant admits that the writing of the letters referred to was its act, and not the act of an unauthorized agent. By its own pleading and admissions, it has precluded itself from raising the point that the cashier had no power to bind it, by agreeing that the bank would act as agent for the plaintiff."

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The argument urged in support of the motion to dismiss is, principally, that the judgment of the state supreme court rested on two grounds, one of which, broad enough in itself to sustain the judgment, involved no federal question.

Action against National Bank—Federal Jurisdiction.

This contention is so far justified as to give color to the motion, although, under our decision in *Bank v. Townsend*, 139 U. S. 67, 11 Sup. Ct. 496, we must decline to sustain it, while, at the same time, that case affords sufficient authority, if authority were needed, for an affirmance of the judgment.

There, bonds have been sold and delivered to a national bank at a certain price, under an agreement that the bank would, on demand, replace them at that or a less price, and the bank had refused compliance. In an action against the bank, its defense was, in part, that, by reason of want of authority to make the alleged agreement and purchase, it could not be held liable for the bonds, on any ground whatever. It was decided, however, that the national banking act did not give a national bank an absolute right to retain bonds coming into its possession by purchase under a contract which it was without legal authority to make, and that, although the bank was not bound to surrender possession of them until reimbursed to the full amount due to it, and might hold them as security for the return of the consideration paid, yet that, when such amount was returned, or tendered back to it, and the return of the bonds demanded, its authority to retain them no longer existed, and, from the time of such demand and its refusal to surrender the bonds to the vendor or owner, it became liable for their value, on grounds of implied contract, apart from the original agreement under which it obtained them.

Same—Conversion—Ultra Vires.

Here, the bank was found to have itself purchased notes which the owner had authorized it to sell to a third party, and, on general principles of law, it was held liable for their value as for a conversion, even

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though it was not within its powers to sell them as the owner's agent.

We are of opinion that the supreme court of North Dakota committed no error in the disposition of any federal question, and its judgment is affirmed.

NOTE.

National Banks—Liability on Ultra Vires Contract.—If a national bank has entered into a contract not authorized by its charter, it is held by the Supreme Court of the United States that the bank cannot repudiate the contract and at the same time retain the fruits of such contract; *Casey v. La Societie, etc.*, 2 Woods (U. S.) 77. See also *Norton v. Derry Nat. Bank*, 61 N. H. 589, 60 Am. Rep. 334; *First Nat. Bank v. Stewart*, 107 U. S. 676, 1 Am. & Eng. Corp. Cas. 138.

And where a national bank, in order to secure its indebtedness, takes possession, by its cashier, of goods under a chattel mortgage and disposes of them, it cannot claim immunity from liability for any surplus remaining after payment in full of its claims, on the ground that its cashier, being an officer of a national bank, exceeded his powers and acted *ultra vires*. *Cooper v. First Nat. Bank*, 48 Kan. 5.

MOORE

v.

RIVERSIDE BANK.

(*Supreme Court of New York, Appellate Term, Jan. 23, 1899.*)

Deposited Checks—Ownership.*—Where a check was deposited in a bank by its customer, in the ordinary course of business, and credit given to the depositor therefor in her pass book, and the evidence as to whether the check was received and credited as money is conflicting, the check is the property of the bank, and it is indebted to the depositor for the amount of the check.

APPEAL by defendant from Tenth district municipal court, borough of Manhattan. *Affirmed.*

Argued before BEEKMAN, P. J., and GILDERSLEEVE and GIEGERICH, JJ.

*See note at end of case.

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Lyman L. Settle, for appellant.

Percival S. Menken, for respondent.

BEEKMAN, P. J. The plaintiff, having an account with the defendant, deposited with the bank a certified check, which was received by it, and credit given to the plaintiff therefor in her pass book. In the course of transmission to the bank on which it was drawn, the check was lost; and the defendant, taking the position that it was the property of the depositor, and not of the bank, refused to recognize the credit which it had given the plaintiff therefor when the deposit was made. The plaintiff accordingly brought this action for the recovery of the amount of the bank's indebtedness to her, and judgment was awarded in her favor.

The law is well established in this state that upon a deposit being made by a customer in a bank, in the ordinary course of business, of money or of drafts or checks received and credited as money, such money, drafts, or checks become the property of the bank in absolute ownership. *Bank v. Loyd*, 90 N. Y. 530; *Cragie v. Hadley*, 99 N. Y. 131, 1 N. E. 537; *People v. St. Nicholas Bank*, 77 Hun, 159, 164, 178, 28 N. Y. Supp. 407. The rule, under certain conditions, is subject to qualification, to which, however, it is unnecessary to refer, as such conditions do not exist here. There was some evidence offered in the case tending to show that the check in question was not received by the bank, and credited as money; but there was a conflict upon this point, and in this regard, as well as in all other cases where there was any issue of fact, the question must be held to have been resolved by the trial justice in favor of the plaintiff, to whom judgment has been awarded. The case therefore is one which comes directly under the rule of law above stated. When the check in question was deposited, it became the property of the bank; and the latter thereupon became indebted to the plaintiff for its amount, and the recovery of the check and the sum due thereon was a matter of concern to the defendant alone. The acts of

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the plaintiff in facilitating the efforts of the bank in that regard were gratuitous, and cannot be used to her disadvantage. The judgment was right, and should be affirmed.

Judgment affirmed, with costs. All concur.

NOTE.

Title to Deposit as between Bank and General Depositor.—The relation between the bank and a general depositor is not that of agent and principal, or of trustee and *cestui que trust*, but is merely that of debtor and creditor.

England.—*Devaynes v. Noble*, 1 Meriv. 541; *Foley v. Hill*, 2 H. L. Cas. 39; *Crosskill v. Bower*, 32 Beav. 86; *Carr v. Carr*, 1 Meriv. 541; *Bishop v. Jersey*, 2 Drew. 143; *Bellamy v. Majoribanks*, 8 Eng. L. & Eq. 517; *Sims v. Bond*, 5 B. & Ad. 389, 27 E. C. L. 97; *Watts v. Christie*, 11 Beav. 546; *Ex p. Waring*, 36 L. J. Ch. 151.

United States.—*In re Madison Bank*, 5 Biss. (U. S.) 515.

Alabama.—*Wray v. Tuskegee Ins. Co.*, 34 Ala. 58; *Alston v. State*, 92 Ala. 124; *Ex p. Jones*, 77 Ala. 330.

California.—*Janin v. London, etc., Bank*, 92 Cal. 14, 27 Am. St. Rep. 82.

Colorado.—*Adams v. Schiffer*, 11 Colo. 15, 7 Am. St. Rep. 202; *Boettcher v. State Nat. Bank*, 15 Colo. 16.

Georgia.—*Ricks v. Broyles*, 78 Ga. 610, 6 Am. St. Rep. 280.

Illinois.—*Marine Bank v. Chandler*, 27 Ill. 525, 81 Am. Dec. 249.

Indiana.—*Coffin v. Anderson*, 4 Blackf. (Ind.) 395; *McEwen v. Davis*, 39 Ind. 109; *McLain v. Wallace*, 103 Ind. 562; *Lamb v. Morris*, 118 Ind. 179; *Bedford Bank v. Acoam*, 125 Ind. 584, 21 Am. St. Rep. 258; *Wasson v. Lamb*, 120 Ind. 514, 16 Am. St. Rep. 342.

Iowa.—*Lowry v. Polk County*, 51 Iowa 50, 33 Am. Rep. 114; *Loug v. Emsley*, 57 Iowa 11.

Louisiana.—*Schmidt v. Barker*, 17 La. Ann. 261, 87 Am. Dec. 527.

Massachusetts.—*Carr v. National Security Bank*, 107 Mass. 45, 9 Am. Rep. 6.

Michigan.—*Perley v. Muskegon County*, 32 Mich. 132, 20 Am. Rep. 637.

Minnesota.—*Davis v. Smith*, 29 Minn. 201.

Missouri.—*Knecht v. U. S. Savings Inst.*, 2 Mo. App. 563.

Nebraska.—*State v. Bartley*, 39 Neb. 353; *State v. Keim*, 8 Neb. 63.

New York.—*Chapman v. White*, 6 N. Y. 412, 57 Am. Dec. 464; *Curtis v. Leavitt*, 15 N. Y. 52; *Ætna Nat. Bank v. New York Fourth Nat. Bank*, 46 N. Y. 82, 7 Am. Rep. 314; *Jordan v. National Shoe, etc., Bank*, 74 N. Y. 467, 30 Am. Rep. 319; *People v. Mechanics', etc., Sav. Inst.* 92 N. Y. 7, 1 Am. & Eng. Corp. Cas. 573; *Lynch v. Jersey City First Nat. Bank*, 107 N. Y. 179, 1 Am. St. Rep. 803; *Fowler v. Bowery Sav. Bank*, 113 N. Y. 450, 10 Am. St. Rep. 479; *Shipman v. State Bank*, 126 N. Y. 318, 22 Am. St. Rep. 821; *Commercial Bank v. Hughes*, 17 Wend. (N. Y.) 100; *People v. Saint Nicholas Bank*, 77 Hun (N. Y.) 159; *Buchanan Farm Oil Co. v. Woodman*, 4 Thomp.

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& C., (N. Y.) 193, 1 Hun (N. Y.) 639; Hoff v. Coumeight, 14 Misc. Rep. (N. Y.) 314.

North Carolina.—Boyden v. Cape Fear Bank, 65 N. Car. 13; Havens v. Lathene, 75 N. Car. 505; Hawes v. Blackwell, 107 N. Car. 196, 22 Am. St. Rep. 870.

Ohio.—State v. Buttles, 3 Ohio St. 309; Marysville Bank v. Windisch-Mulhaner Brewing Co., 50 Ohio St. 151, 40 Am. St. Rep. 660; Treasurer of Fayette County v. People's and Drovers' Bank (Ohio 1890), 25 N. E. Rep. 701.

Texas.—Baker v. Kennedy, 53 Tex. 200.

Virginia.—Robinson v. Gardiner, 18 Gratt. (Va.) 509.

Wisconsin.—Shoemaker v. Hinze, 53 Wis. 116; Henry v. Martin, 88 Wis. 367.

DOPPELT

v.

NATIONAL BANK OF THE REPUBLIC.

(*Supreme Court of Illinois, Oct. 24, 1898.*)

Deposited Checks—Effect of Endorsements in Blank.*—Plaintiff deposited with a banking firm two checks indorsed by him in blank, which the banking firm, after endorsing for collection to its credit, deposited with the defendant bank. *Held*, that defendant having no knowledge to the contrary, was authorized to act upon the banking firm's endorsements of the checks, and to proceed to collect them and credit the banking firm's account with the proceeds.

Evidence.—The admission of evidence to show the state of the accounts between defendant and such banking firm was properly refused, being irrelevant.

APPEAL by plaintiff from First district appellate court. *Affirmed.*

Daniel M. Rothschild (*Blum & Blum*, of counsel), for appellant.

Lowden, Estabrook & Davis, for appellee.

CARTER, J. The appellant, Jacob Doppelt, deposited with the banking house of Kopperl & Co. two checks on New York banks, both indorsed by him in blank, amounting to \$1,518.48, receiving credit for such amount in his pass book. His account was overdrawn several hundred dollars at the time, and

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*See note at end of case.

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he drew against his account after making this deposit. The banking firm deposited the checks with appellee, indorsing them, "For collection to the credit of Kopperl & Co." Appellee gave credit on its books to Kopperl & Co. for the amount, and sent the checks on to New York for collection, and they were paid on or before February 14, 1896. On the latter day Kopperl & Co. made an assignment for the benefit of their creditors. Appellant filed his claim with the assignee for the balance due on his account with Kopperl, being \$1,017.58, which was the proceeds of these checks less the amount he had checked out. Subsequently he brought this action in the circuit court of Cook county against appellee, alleging that Kopperl received these checks as his agent for collection; that he was not indebted to Kopperl at the time; that Kopperl was then insolvent, and had since made an assignment for the benefit of his creditors; that appellee had received these checks from Kopperl for collection, and duly collected them; and that by reason of the premises the appellee became liable to account to appellant for the proceeds. The cause was heard before the court without a jury, and judgment was entered for the defendant below. The plaintiff appealed to the appellate court, where the judgment was affirmed.

Under the pleadings it became incumbent on appellant to show that he deposited these checks with Kopperl for collection only. He indorsed them in blank, without any restrictions whatever;

and, under the well-settled rule of this state, he thereby transferred a good title to Kopperl, free from all equities in his favor,

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—Effect of Indorse-
ments in Blank.

and the appellate court has so found. Under these circumstances, appellee could not know that he claimed or pretended to any rights in the paper, and it was authorized to act upon Kopperl's indorsement of the checks, and proceed to collect the same and credit his account with the proceeds. Its cashier testified that Kopperl drew against these checks, and that his account was over-drawn, and when he failed there was no bal-

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ance to his credit. All the facts having been found by the appellate court against appellant, and the judgment of the court being in accord with the law on such facts, there is no question left, affecting the merits of the case, for us to pass upon.

Exceptions were taken to the refusal of the trial court to admit evidence that appellee held collateral to secure it for Kopperl's indebtedness. The evidence was properly refused, as wholly irrelevant to the question whether Kopperl was indebted to appellee. It had no knowledge that appellant claimed any interest in the proceeds of the checks. It therefore had the right to act upon his indorsement, treat the checks as Kopperl's property, credit his account, and honor his drafts accordingly. Even if appellant could, after having filed his claim for the balance due from Kopperl against his estate, have rescinded the transaction, and recovered the checks or their proceeds in the hands of the assignee (American Trust & Sav. Bank v. Gueder & Paeschke Mfg. Co., 150 Ill. 336, 37 N. E. 227), he clearly had no such right as against appellee, who had applied the proceeds as directed by Kopperl; he having an unrestricted indorsement. The judgment of the appellate court must be affirmed. Judgment affirmed.

NOTE.

Effect of Endorsement in Blank.—A draft was indorsed in blank and deposited in a bank for collection. The bank indorsed it "for collection" and forwarded it to a second bank. The second bank, thereupon, upon the request of the first bank and upon the credit of the draft, remitted a large amount of money to the first bank. It was held that upon the insolvency of the first bank the original depositor of the draft was not entitled to recover it in an action of trover against the second bank. *Cody v. City Nat. Bank*, 55 Mich. 379. In delivering the opinion of the court, CAMPBELL, J., said: "The whole case really hinged upon whether the defendant had notice which should have prevented it from treating the paper as Rice & Messmore's [the first bankers] and advancing them money upon it. * * * When the paper came into defendant's hands, it had an unqualified blank indorsement of plaintiffs' which presumptively

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transferred title to any one who might become the holder. The fact that Rice & Messmore indorsed it 'for collection' had no tendency to show that they held it themselves merely as agents for plaintiffs, or even received it from them directly. The undisputed facts show that it was not left with them in such a way that they were bound to regard it themselves as left for plaintiffs' use, except as a deposit. But the defendant is not claimed to have had any notice outside of the paper itself. The paper came to defendant with express directions to collect and credit, and with an order for an immediate remittance of a large sum, which nearly exhausted it. This was not an exceptional case, but was in the usual course of their mutual business."

TAFT

v.

QUINSIGAMOND NAT. BANK.

(Supreme Judicial Court of Massachusetts, Jan. 6, 1899.)

Checks—Whether Sale or Deposit for Collection.*—The defendant bank received from plaintiff upon deposit a check endorsed without restriction and gave credit for it to the depositor as cash in a drawing account, and while defendant was trying to get the maker to pay the check, a period of over two months, plaintiff's checks were honored by defendant at times when his account would not have been enough to meet them if the amount of the first mentioned check had been charged back to plaintiff. There was no evidence as to any custom or agreement having a tendency to show that the bank received such check for collection as plaintiff's agent. *Held*, that a finding that the bank purchased such check was warranted by the evidence.

EXCEPTIONS by defendant from Worcester county superior court.

Geo. S. Taft, in *pro. per.*

F. P. Goulding and *W. C. Mellish*, for defendant.

BARKER, J. The action is said by the bill of exceptions to be a suit to recover the amount of a check deposited by the plaintiff in the defendant bank, and credited to him upon deposit, and afterwards charged back by the bank. The declaration has two counts,—

*See notes at end of case.

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one for refusal to pay the plaintiff's check drawn upon the defendant, and the other upon an account in which the defendant is debited with the amounts of the plaintiff's deposits, and with the protest fees on his dishonored check, and is credited with the amount of his checks paid by the defendant; the balance being the amount for which, with interest, the court below found for the plaintiff. Whether the bank was indebted to the plaintiff, and bound to honor his check, depended upon the dealings with reference to the check which he deposited on August 2, 1897, and the amount of which was charged back upon the writing up of his pass book, on November 19, 1897.

The defendant contends that the finding that it became at any time a purchaser of the deposited check was unwarranted. But the purchase of negotiable paper by a bank is as clearly within its legitimate powers as is the collection of such paper by the bank as an agent. The deposit of money by a customer to his credit in a drawing account, without more, creates between the bank and the customer the relation "of debtor and creditor, not of agent and principal." *Carr v. Bank*, 107 Mass. 45. So, when, without more, a bank receives upon deposit a check indorsed without restriction, and gives credit for it to the depositor as cash in a drawing account, the form of the transaction is consistent with, and indicates, a sale, in which, as with money so deposited, the check becomes the absolute property of the banker. The matter may be regulated by statute, as in the state of New York, or there may be general usages of business obtaining in the locality which color the transaction. So, a bank, by general notices printed on its pass books or deposit slips, or otherwise brought to the knowledge of its depositor, or by agreement with the particular depositor as to his own deposits, or by crediting negotiable paper as paper, and not as cash, or by a particular contract in any special instance, may define its position as that of agent or purchaser. Usually the cases in which a bank is held to have been only an agent for

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collection have, as a controlling element, evidence of usage or notice or particular agreement. In the present case there was no evidence of usage or custom, nor was it shown that the defendant informed its customers by notices upon its pass books or deposit slips, or otherwise, that it accepted deposits of commercial paper only as an agent for collection. Nor was it shown either that such was its general arrangement with the plaintiff, or that he understood that it was the arrangement ordinarily made by the defendant with its depositors.

The conversation between the plaintiff and the teller at the time when the deposit was made is consistent with the theory that the bank took the check as an absolute purchaser, relying for reimbursement upon the plaintiff's liability as indorser if the check should not be paid, or the theory that the bank took the check as a conditional purchaser, with the option of retransferring its ownership to the plaintiff upon ascertaining, within a reasonable time, that the check was not honored upon presentment to the drawee, as well as with the defendant's theory that it took the check as an agent for collection. It is not disputed that no information was given by the bank to the plaintiff that there was difficulty in collecting the check until September 8, 1897. From that time, until the amount of the check was charged back to the plaintiff in the writing up of his pass book on November 19, 1897, there were frequent interviews and communications, none of which are decisive in favor of either party, between the plaintiff and the defendant's officers, with reference to the check. It seems that, upon the receipt of the check, the defendant sent it to its Boston correspondent, who, having no correspondent near Edgmont, S. D., where the bank on which the check was drawn was located, mailed the check in a letter directed to that bank, and that the drawee has never admitted receiving the letter. Between September 8th and November 19th the plaintiff knew of the defendant's efforts to find the check, and to induce the maker to pay the check or to give a

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duplicate of it. In this interval the plaintiff's checks were honored by the defendant at times when his account would not have been enough to meet them if the amount of the missing check, had been charged back, and on October 23d his pass book was written up by the bank without charging back this amount. In due course of mail, the defendant's Boston correspondent should have received on August 21st, at the latest, an answer to its letter inclosing the check to the drawee. It cannot be said that these circumstances show conclusively that the bank took the deposited check as an agent for collection, and the finding that it became a purchaser must stand. This finding makes all questions as to the negligence of the defendant or of its correspondent immaterial. The defendant, having no right to charge back the amount of the deposited check, was a debtor to the plaintiff for money which the latter could recover upon demand, and the refusal to rule that the plaintiff's damages were merely nominal was right. See *Winslow v. Bank*, 171 Mass.—, 51 N. E. 16. Exceptions overruled.

NOTES.

Effect of Crediting Paper when Received as Cash.—The fact that the depositor's account is credited with the amount of the items taken for collection does not of itself operate to so transfer the title to the paper; for, by the custom of bankers, the collection is charged back at once if not paid. *Levi v. National Bank*, 5 Dill. (U. S.) 104; *Marine Bank v. Fulton Bank*, 2 Wall. (U. S.) 256; *National Gold Bank, etc., Co. v. McDonald*, 51 Cal. 64, 21 Am. Rep. 697; *Armstrong v. Boyertown Nat. Bank*, 90 Ky. 431; *Manufacturers' Nat. Bank v. Continental Bank*, 148 Mass. 553, 12 Am. St. Rep. 598; *Chosen Freeholders v. State Bank*, 32 N. J. Eq. 467; *Hazlett v. Commercial Nat. Bank*, 132 Pa. St. 118; *Rapp v. National Security Bank*, 136 Pa. St. 426; *Columbia Second National Bank v. Cummings*, 89 Tenn. 609, 24 Am. St. Rep. 618.

Title to Check Deposited—Effect of Bank Custom to Credit as Cash.—A check was deposited for collection with a bank which suspended on the following day, its receiver claiming the uncollected check as against the plaintiff by whom it had been deposited. It was held that the plaintiff was entitled to a return of the check, and

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that the fact that it had been the custom of the bank to credit such checks as cash, and allow depositors to draw against them before collection, made no difference, such a practice existing merely by way of favor. *Balbach v. Frelinghuysen*, 15 Fed. 675. To the same effect as to the custom of banks to credit checks received as cash, is *Beal v. Somerville*, 5 U. S. App. 14. where the authorities are discussed at length. See also *In re State Bank*, 66 Minn. 119, 45 Am. St. Rep. 454.

In *Hazlett v. Commercial Nat. Bank*, 132 Pa. St. 118, it was held that when a depositor transmits to a bank for credit his own check or draft upon a third bank, the bank receiving it becomes the depositor's agent for collection, and the relation is not affected by the fact that the amount of the draft is at once credited to the depositor as cash.

The *New York* case of *Metropolitan Nat. Bank v. Loyd*, 90 N. Y. 530, *affirming* 25 Hun (N. Y.) 101, where the crediting of a check as cash and the acceptance of such credit by the customer was held to transfer title to the bank, was the case of a deposit simply, not for the purpose of collection, and it was admitted that the title would have remained in the depositor had the deposit been for collection. In *National Butchers', etc., Bank v. Pubbell*, 117 N. Y. 384, 15 Am. St. Rep. 515, where the deposit was specifically "for collection," title was held not to pass, although credit was given at once on reception and before collection.

CONTINENTAL NAT. BANK OF NEW YORK

v.

TRADESMEN'S NAT. BANK OF NEW YORK.

(*Supreme Court of New York, Appellate Division, Jan. 13, 1899.*)

Payment of Raised Paper—Right to Recover.*—Where the drawee bank pays a draft when it is chargeable with notice that the body of the draft has been forged or altered, it cannot recover the amount from another bank to which it is paid, if the latter was entitled to rely on such payment when it became the holder of the draft, and if such recovery would result in injury to the latter.

Certified Checks from Clearing House—Cancellation—Payment.—It was the custom of the plaintiff bank, when certified checks were returned from the clearing house, to have them delivered to its check clerk, and, if they were found correct upon comparison with the certification book by such clerk, they were cancelled, and on the next day, were included in the bank's clearing house balance to be

*See note at end of case.

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paid by it according to custom. *Held*, that such cancellation amounted to payment of the draft.

Payment of Raised Paper—Negligence—Question for Jury.—There being evidence tending to show that the plaintiff bank was guilty of culpable negligence in receiving a raised draft through the clearing house on a certain date, without making any examination of the draft or comparing it with a letter of advice from the drawer, in cancelling it as paid, and in holding it for a certain length of time, the question whether the payment of the draft was such culpable negligence as to preclude the plaintiff from recovering money it had paid thereon, should have been submitted to the jury.

Same—Right to Recover.—If plaintiff was guilty of such negligence, it would not be entitled to recover the proceeds of such draft which had been paid out by defendant in good faith, before notice of the forgery, relying upon the payment of the draft by the plaintiff; but it could only recover the difference between the amount so paid out and the amount of the draft.

APPEAL by defendant from trial court. *Reversed*.

Argued before VAN BRUNT, P. J., and BARRETT, RUMSEY, PATTERSON, and INGRAHAM, J. J.

Charles E. Rushmore, for appellant.

George W. Wickersham, for respondent.

INGRAHAM, J. On June 7, 1894, the Philadelphia National Bank, a depositor in the plaintiff bank, drew a draft upon the plaintiff, with the serial number 2,269, dated on that day, and payable to Henry F.

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Thompson, for \$76. This draft appears subsequently to have been altered by changing the date from June 7th to June 12th, and the amount from \$76 to \$7,660; and, so altered, it was presented on the 13th day of June, 1894, at the plaintiff bank, and certified by its paying teller. On June 14, (the following day), the draft was presented by the defendant to the plaintiff at the New York Clearing House, and paid by the plaintiff to the defendant. The plaintiff subsequently brought this action to recover the amount so paid, less that for which the draft was originally drawn. The question as to the right of the plaintiff to recover back this money may be viewed in two aspects: First, with reference to its liability on the certification of the draft, on June 13th; and, second, respecting the

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right to recover the amount paid to the defendant, such payment having been made on June 14th, and in the regular course of business. In the view we have taken of this second aspect of the question, it is unnecessary to discuss the obligation of the plaintiff to the defendant, the holder of the draft, in consequence of the certification on June 13th.

In an action for money had and received, "the plaintiff's case depended upon the question to which party, plaintiff or defendant, does the money, *ex æquo et bono*, belong? If to the plaintiff, it was because the facts created an indebtedness to him from defendant. In this respect the action has been frequently stated to be an 'equitable one'; that is, one depending upon the general principles of equity for the maintenance of the plaintiff's claim to the money. It is the most favorable way in which a defendant can be sued. He can be liable no further than the money he has received, and against that he may go into every equitable defence upon the general issue. He may claim every equitable allowance, etc. In short, he may defend himself by everything which shows that the plaintiff, *ex æquo et bono*, is not entitled to the whole of his demand, or any part of it." Chapman v. Forbes, 123 N. Y. 536, 26 N. E. 3. The right of a bank to recover the amount it has paid, under a *bona fide* mistake of fact, to a person presenting to it a raised draft, is clearly established. The form of the action in which such a recovery can be had is that for money had and received. White v. Bank, 64 N. Y. 319. In such a case, the defendant may, upon the general issue, show any fact to defeat the action which would make it inequitable to allow the plaintiff to recover; and, if it appears that it would be inequitable to throw the loss upon the person to whom such check or draft has been paid, a recovery will not be allowed.

As was said by MR. JUSTICE STORY, in the United States Bank v. Bank of Georgia, 10 Wheat. 343:

"In respect to persons equally innocent, where one is bound to know an act upon his knowledge, and the

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other has no means of knowledge, there seems to be no reason for burdening the latter with any loss in exoneration of the former. There is nothing unconscientious in retaining the sum received from the bank in payment of such notes, which its own acts have deliberately assumed to be genuine."

This rule is stated by LORD ABINGER in *Kelly v. Solari*, 9 Mees. & W. 57, as follows :

"The safest rule, however, is that if the party makes the payment with full knowledge of the facts, although under ignorance of the law, there being no fraud on the other side, he cannot recover it back again. There may also be cases in which, although he might, by investigation, learn the state of facts more accurately, he declines to do so, and chooses to pay the money notwithstanding. In that case there can be no doubt that he is equally bound."

And this rule has been followed without exception in England and this country. A drawee, when a bill or check is presented to him, is bound to use such knowledge as he has of any alteration or defect in the bill or check; and if he, having knowledge that the bill or check is forged, pays it, he will not be allowed to say that he paid it under a *bona fide* mistake of fact. Thus, it is settled that where a check is paid on presentation to the bank upon which it is drawn, and the name of the drawer of the check is forged, the payment was not made under a mistake of fact which would justify a recovery of the money paid. The ground of this rule is that the drawee is chargeable with knowledge of the signature of the drawer.

In *Daniel on Negotiable Instruments* (section 1362), it is said :

"In all the cases which hold the drawee absolutely estopped by acceptance or payment from denying the genuineness of the drawer's name, the loss is thrown upon him, on the ground of negligence on his part in accepting or paying until he has ascertained the bill to be genuine."

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And JUDGE RUGGLES, in *Bank of Commerce v. Union Bank*, 3 N. Y. 234, says :

“This rule is founded on the supposed negligence of the drawee in failing, by an examination of the signature when the bill is presented, to detect the forgery, and refuse payment. The drawee is supposed to know the handwriting of the drawer, who is usually his customer or correspondent. As between him, therefore, and an innocent holder, the payor, from this imputed negligence, must bear the loss.”

Thus, where the law imputes to the drawee of a check or draft knowledge of the signature of the drawer, the payment of the check or draft by the drawee prevents him from recovering back the money, as the drawee was negligent in not employing the knowledge imputed to him; and, as between the drawee and a *bona fide* holder of the check or bill for value, such *bona fide* holder will be entitled to retain the proceeds in his own hands. But where the forgery is not in counterfeiting the name of the drawer, but in altering the body of the bill, the drawee is not presumed to know the handwriting of the body of the bill, and is not chargeable with knowledge of the alteration in the bill itself so long as the signature of the drawer is genuine; and, where he has paid such an amount without notice that the bill has been raised or altered, he is entitled to recover; for, as JUDGE RUGGLES says in *Bank of Commerce v. Union Bank*, *supra* :

“To require the drawee to know the handwriting of the residue of the bill is unreasonable. It would, in most cases, be requiring an impossibility. Such a rule would be not only arbitrary and rigorous, but unjust. The drawee would undoubtedly be answerable for negligence in paying an altered bill, if the alteration were manifest on its face.”

And JUDGE RAPALLO, in *National Bank of Commerce v. National Mechanics' Banking Ass'n*, 55 N. Y. 216, applying the same principle, says :

“The bank was not bound to know the handwriting or genuineness of the filling up of the check. It was

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legally concluded only as to the signature of the drawer and its own certification. * * * If the defendant had shown that it had suffered loss in consequence of the mistake committed by the plaintiff,—as, for instance, if, in consequence of the recognition by the plaintiff of the check in question, the defendant had paid out money to its fraudulent depositor,—then, clearly, to the extent of the loss thus sustained, the plaintiff should be responsible.”

The ground of this distinction between a case where the signature of the drawer of the bill is forged and one where the signature of the drawer is genuine, but the body of the bill has been changed, is apparent. The law imputes to the drawee a knowledge of the drawer's signature; and, where he pays the bill to which the name of the drawer has been forged, he is guilty of negligence in not applying the knowledge imputed to him, and he will not be permitted to recover the proceeds of the bill from a *bona fide* holder. On

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the same reasoning, when the body of the bill has been forged or altered, and the drawee has knowledge thereof when it is presented for payment, and with such knowledge pays it, he has not paid it under a *bona fide* mistake of fact, which would allow him to recover the money thus paid from the person to whom it has been paid, and who has relied on such payment to his injury. If the drawee has such knowledge, he is bound to apply it; and if he fails to do so, and pays the bill, he is as guilty of negligence as in the case where the knowledge is imputed to him. In either case he cannot recover, because he has been negligent in applying either the knowledge which he actually has, or that which the law ascribes to him; and such negligence prevents a recovery of the money paid.

The rule is recognized in the cases before cited, but is very clearly stated in *Clews v. Association* (which was three times before the court of appeals) 89 N. Y. 422; 105 N. Y. 401, 11 N. E. 814; 114 N. Y. 70, 20 N. E. 852. Upon the first appeal, when there had been a

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judgment for the plaintiff, JUDGE EARL, in discussing the liability of the certifying bank, said :

"When * * * a bank has thus certified a raised check by mistake, and subsequently pays the money thereon, without any culpable negligence on its part, it can recover the amount thus paid as money paid by mistake."

In that case a check had been certified by the defendant, and after such certification it had been altered so as to call for a larger amount than that for which it had been drawn and certified. It was offered to the plaintiffs (purporting to be drawn for \$2,540) in payment for \$2,500 in government bonds. Before accepting it, the plaintiffs sent it by their messenger to the drawee ; and it was presented to the paying teller with the statement that Henry Clews wanted to know if the certification was good. The teller looked at it, and answered, "Yes." Relying upon that statement, the plaintiffs accepted the check in payment for the bonds, and delivered them. The bank, 17 days before the inquiry was made of its teller, had received notice from the drawer of the check that it had been lost, and payment of the original which the defendant had certified was stopped. Upon the second appeal (105 N. Y. 401, 11 N. E. 814), the court held that it was a question for the jury to say whether it was culpable negligence to answer the question without recourse to the certification book and the book of stop payments, which referred to the draft in question by its number, and would have disclosed the fraud; and, upon a subsequent trial, that question was submitted to the jury, and answered in the affirmative, and the judgment in favor of the plaintiffs for the amount of the draft as raised was affirmed by the court of appeals. 114 N. Y. 70, 20 N. E. 852. See, also, Gloucester Bank v. Salem Bank, 17 Mass. 41, where the court says :

"In all such cases, the just and sound principle of decision has been that, if the loss can be traced to the fault or negligence of either party, it shall be fixed upon him."

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We have thus the general rule that, to entitle the drawee of a check to recover the amount it has paid upon a raised check, the payment must have been made without culpable negligence, and that where the drawee has received notice that a check has been lost, and payment of it stopped, or facts from which it would appear that it had been raised, and pays the check without examination, and under such circumstances as show culpable negligence, the drawee does not make payment under a mistake of fact which would allow a recovery against a *bona fide* holder who has parted with or used the amount, relying on the payment on the check by the drawee.

The facts relied upon by the defendant to show culpable negligence of the plaintiff in paying this draft are not in dispute. The Philadelphia National Bank, the drawer of the draft in question, had what is known as an active account with the plaintiff bank, and had occasion to draw drafts upon it almost daily. At the close of each day's business, the Philadelphia Bank invariably notified the plaintiff of all drafts it had drawn upon the plaintiff bank on that day. The officers of both the plaintiff and the Philadelphia Bank testified that there was never any deviation from this rule. These notifications were in the form of letters of advice, as follows: "The following described drafts have this day been drawn by the Philadelphia National Bank upon the Continental Bank, N. Y." Then followed a list, with the serial number of each draft, the name of the payee, and the amount thereof. These letters of advice were received by the plaintiff bank on the morning following the day on which they were written, were delivered to the plaintiff's bookkeeper in charge of the account of the Philadelphia Bank, and were kept by him on a clip upon his desk. As each draft specified in the letter of advice was certified or paid, the bookkeeper checked the letter of advice, opposite such draft. Thus, the officers of the bank had information, when each draft was presented, which would enable them to ascertain its genuineness, and

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see if an alteration had been made in it. Each draft could be identified by its number and the name of the payee, and the plaintiff had notice of the amount for which each draft was drawn.

On June 7, 1894, the Philadelphia Bank drew upon the plaintiff a draft, No. 2,269, payable to Henry F. Thompson, for \$76, and sent it to Thompson, at Baltimore, by mail, and on the same day sent the plaintiff a letter of advice stating that it had drawn a draft upon the plaintiff, No. 2,269, in favor of Henry F. Thompson, for \$76. This letter was received by the plaintiff on the morning of June 8, 1894, and was at that time delivered to the bookkeeper having charge of the account of the Philadelphia Bank, and placed by him upon the clip at his desk. That letter remained continuously before the bookkeeper from the morning of June 8th until it was taken by him from the clip, on the afternoon of June 14th. It contained a notification of all the drafts which had been drawn on June 7th, that in question being the first drawn on that day. There were in all eight of such drafts, the numbers running from 2,269 to 2,276, inclusive. On each of the following days on which drafts were drawn, the Philadelphia Bank sent to the plaintiff a letter of advice of the drafts drawn on the day the letter was sent. On June 12th, advice was given to the plaintiff of the drawing of 10 drafts, the serial numbers running from 2,287 to 2,297, inclusive; and, by a separate letter, notice was given of a draft, No. 2,302, drawn on the same day; and on June 13th the Philadelphia Bank advised the plaintiff of its drawing one draft on that day with the serial number 2,302. These letters were, as usual, received upon the day subsequent to their date.

The plaintiff had, therefore, on the morning of June 13th, notice that draft No. 2,269 had been drawn in favor of Henry F. Thompson, for \$76, and that on June 12th drafts had been drawn numbered 2,287 to 2,297, inclusive, and one numbered 2,302. On the morning of June 13, 1892, a draft drawn

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by the Philadelphia Bank, numbered 2,269, which purported to be dated June 12, 1894, payable to the order of Henry F. Thompson, for \$7,660, was presented to the paying teller for certification. This draft bore the same number, and was payable to the order of the same person, as the one which the plaintiff had been notified had been drawn on June 7th, for \$76. The date, however, was changed to June 12th, and the amount changed to \$7,660, instead of \$76. When this draft was presented to the paying teller of the plaintiff bank for certification, he took it to the bookkeeper who had charge of the Philadelphia Bank's account, and who had before him upon the clip on his desk the letters of advice from the Philadelphia Bank; and holding this draft in front of the bookkeeper, so that he could see all parts of it, including the serial number, he said to the bookkeeper, "Is this check all right?" The bookkeeper said it was. Whether or not he examined the letters of advice from the Philadelphia Bank at that time, or answered without such examination, does not appear, but he did not make any check on the letter of advice. The paying teller then went back to his desk, and certified the draft, entering its amount in his certification book, but omitted to enter in his book, as was his custom, the serial number of the draft, and delivered it to the person presenting it for certification. After this draft had been thus certified, the certification book was delivered to the bookkeeper, and from that he charged up as against the depositor the amount of the draft so certified in the depositor's account. The evidence is that instructions issued by the plaintiff to the paying teller were, always to inquire of the bookkeeper before certifying a check; that it was the duty of the bookkeeper to ascertain whether or not the account was good for the check presented; and that, where letters of advice were received, it was the duty of the bookkeeper to consult such letters before informing the paying teller in regard to the check. The bookkeeper testified that when he entered this draft, on the afternoon of June

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13th, he noticed that the paying teller had neglected to enter the serial number in the certification book ; that at that time he also knew and had in mind the fact that the plaintiff had not received any letter of advice from the Philadelphia Bank that a draft for the amount called for by this certified draft had been drawn. Thus, his attention was expressly called to the fact that a check for \$7,660, which had been submitted to him for inspection, had been certified by the teller, when no advice had been received from the Philadelphia Bank of the drawing of such a draft, he having before him the letters of advice from the Philadelphia Bank of the drafts which it had drawn upon the plaintiff on June 12th (the date of the draft in question), together with notice of all drafts drawn prior to that time, with the serial number of all drafts drawn, and notice that a draft with this same number had been drawn to this payee for \$76. He noticed that the teller in certifying this draft, of which the plaintiff had no advice, had omitted to put in his certification book the number of the draft, which was, as testified to, an unusual occurrence. These facts thus brought to the attention of the bookkeeper on the afternoon of June 13th, he then communicated to the general bookkeeper of the bank. Thus, the officers of the bank had notice of these facts which had been specifically called to their attention on the afternoon of June 13th. It also appears that the drafts drawn and certified under these circumstances are almost invariably paid through the New York Clearing House, and that, in the usual course of business, that draft would be presented at the clearing house for payment on the following morning. These facts relating to this particular draft thus certified being brought to the attention of the plaintiff's officers, no further inquiry was made by the plaintiff bank concerning it ; although it appears that on the next day, in the afternoon, when the cashier's attention was called to the discrepancy between the draft and the letter of advice, the Philadelphia Bank was communicated with by telephone, and within a very few moments information

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was given to the plaintiff that no such draft had been drawn. If, on the afternoon of June 13th, the officers of the bank had communicated by telephone with the plaintiff bank, as they did on the afternoon of June 14th, we must assume that no difficulty would have been experienced in obtaining at once the information which they obtained on the afternoon of June 14th, *viz.* that no draft for this amount had been drawn. No such precaution, however, was taken. The officers of the bank simply did nothing.

On June 13th, after the draft had been certified, it was deposited with the defendant bank by Thompson, the payee, who had an account in that bank, and the amount was then placed to his credit. He made no effort to draw any part of the money on June 13th, and on the morning of June 14th the defendant bank presented this draft, so certified by the plaintiff, to the plaintiff for payment, through the clearing house; and the draft was duly paid by the plaintiff. The method of payment through the clearing house is described by the plaintiff's cashier. He stated that, under the rules of the clearing house, the day after a check or draft is deposited with a member of the clearing house, that draft or check, together with all others drawn upon the same bank, are sent to the clearing house, and they are there exchanged for checks or drafts drawn by other banks upon the bank sending in these drafts. That exchange process is done at ten o'clock in the morning, at the clearing house. "If the total amount of checks drawn by other banks against our bank exceed the total amount which our bank has drawn against other banks, then we send the overplus to the clearing house, and they make the payments, distributed, as it may be due, to the other banks. It is a rule of the clearing house that the debit bank must pay in before half past one, and the credit bank cannot receive its credit until after half past one, probably two, o'clock." On June 14th, the plaintiff bank sent to the defendant bank checks and drafts drawn upon it amounting to \$505.72; and the defendant bank sent to the plaintiff bank checks

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and drafts drawn upon it aggregating \$8,053.88, which included this certified draft in question, for \$7,660; and on that day the credit balance of the defendant bank at the clearing house amounted to upward of \$18,000, which included the amount of this draft in question. Thus, on the morning of June 14th, at 10 o'clock, this draft (which, under the rules of the clearing house, would be then presented if deposited on the preceding day with a bank which cleared through the clearing house) was presented at the clearing house to the representative of the plaintiff bank by the representative of the defendant bank, was accepted by the plaintiff's representative there without objection, and returned to the plaintiff, arriving there, as testified to, from about 20 minutes after, to half past, 10 o'clock.

It is the custom of the plaintiff bank, when certified checks are returned from the clearing house, to have them delivered to the check clerk, and he has charge of them during that day. The check clerk compares these certified checks with the entries in the certification book which is kept by the paying teller; and if, upon such comparison, they are found correct, they are then canceled by the bank, and placed in a receptacle or drawer provided for certified checks. When this draft in question was received by the check clerk of the plaintiff bank, on the morning of June 14th from the clearing house, it was by him canceled as paid, and placed in that receptacle, and the credit balance due to the defendant bank from the clearing house was paid by the clearing house. There can be no doubt, I think, that when this draft was examined and found correct by the check clerk, and by him canceled, it was then paid. The evidence is that this generally took place some time between 11 and 1 o'clock. The plaintiff, through its officers, had received this draft from the defendant bank, and had made the examination which they required as to certified checks to ascertain its correctness by a comparison with the certification book. That being found correct, they had canceled the draft,

Certified Checks
from Clearing
House—Cancellation—Payment.

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and placed it in the receptacle in which such drafts were kept. Nothing more remained to be done with it, except to return it to drawer when the account of the Philadelphia Bank with the plaintiff was written up. With knowledge of the facts before stated, the plaintiff had paid the draft, without comparing it with the letters of advice, or making any examination as to its genuineness, when any comparison with the letters of advice on the morning it was received would have at once disclosed the forgery.

The defendant requested the court to submit to the jury the question whether the payment of this draft by the plaintiff, under the circumstances, was culpable negligence, so as to preclude the plaintiff from recovering more than the balance of the depositor's account with

the defendant bank at the time that notice of the forgery was given to the defendant. The court denied that motion, and directed a verdict for the plaintiff. We think there was, at least, a question for the jury to determine whether the bank was culpably negligent in paying this check; and if the

jury should find that it was so negligent, under the rule before stated, the plaintiff could not recover the proceeds of this draft,

which had been actually and in good faith paid out by the defendant before notice of the forgery, relying upon the payment of the draft by the plaintiff. This draft, as before stated, was deposited with the defendant on June 13th, after its certification by the plaintiff. Under the rules of the clearing house, of which both these banks are members, it was delivered to the plaintiff on the morning of June 14th, and was received and paid by it. Under the constitution and rules of the clearing house, in evidence, it is provided that "all checks, drafts, notes, or other items in the exchanges, returned as 'not good' or missent, shall be returned the same day directly to the bank from which they were received." By rule 1 it is provided that "return of checks, drafts, &c., for informality, not good, missent,

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Jury.

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guaranty of indorsement, or for any other cause, should be made before three o'clock of the same day."

On the afternoon of June 14th, some time after 2 o'clock, the depositor who had deposited this draft with the defendant appeared with three checks, aggregating \$7,025, for which he demanded cash. The paying teller of the defendant bank examined his account, and found that he had made a deposit on the day before to an amount which would make his account good for this \$7,025. He examined the deposit slip with which that deposit was made, and saw that the deposit was of a check certified by the plaintiff bank. That check having been sent to the clearing house in the morning, and no notice having been received to the contrary, it was assumed to have been paid by the plaintiff bank; and the paying teller paid the check of the depositor, leaving a balance of account to the credit of the depositor of \$660. The teller swears positively that these payments to Thompson were made between 2 and 3 o'clock, after the check had been paid by the plaintiff bank, before the forgery had been actually discovered by the plaintiff, and before any notice had been given to the defendant of any irregularity in the check. This brings the case within the illustration stated by JUDGE RAPALLO in *National Bank of Commerce v. National Mechanics' Banking Ass'n*, *supra*:

"If the defendant had shown that it had suffered loss in consequence of the mistake committed by the plaintiff, as, for instance, if, in consequence of the recognition by the plaintiff of the check in question, the defendant had paid out money to its fraudulent depositor, then, clearly, to the extent of the loss thus sustained, the plaintiff should be responsible."

Here, if the jury should find that it was culpable negligence on the part of the plaintiff, with the facts which had been called to its attention on the afternoon of June 13th, to receive the draft through the clearing house on June 14th, without making any examination of the draft or comparing it with the letter of advice from the drawer, to cancel it as paid, and hold it until

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after 2 o'clock ; and that the defendant had paid out this money, relying upon the recognition of the draft by the plaintiff, its payment on the morning of June 14th, and its retention in the plaintiff's hands without objection,—then, to the extent of the loss sustained by the defendant in paying the draft to its fraudulent depositor, the plaintiff would be responsible.

On the afternoon of June 14th, some time after 4 o'clock, the bookkeeper of the plaintiff in charge of the Philadelphia Bank, having in mind the facts which had been called to his attention the day before, went to the receptacle in which certified checks were kept, and got out this draft. On comparing it with the letters of advice from the Philadelphia Bank, he at once noticed that there was a discrepancy in the amount of this draft, and, taking the draft and the letter of advice, he brought them to the attention of the cashier of the plaintiff bank. The cashier at once communicated with the Philadelphia Bank, as before stated, by telephone, and received information which disclosed the forgery. He at once went to the defendant bank, arriving there about 5 o'clock in the afternoon, when the principal officers of the bank had left the banking house; and subsequently, in the evening of the same day, he notified the cashier of the defendant bank. Efforts were made the next morning to arrest the person who had obtained the money from the defendant bank, but without success. On the morning of June 15th, this depositor attempted to cash another check at the defendant bank, and also offered for deposit another draft drawn on another bank in New York. It thus appeared that he was in New York on the morning of June 15th, but he subsequently disappeared, and no trace of him could be found. Thus, the plaintiff did not discover the forgery until about half past 4 o'clock on the afternoon of June 14th, although it is apparent that if any examination of this draft had been made at any time before 2 o'clock, and the defendant notified, the money would not have been paid to the forger, and no loss would have been sustained.

Note

Under the rules and constitution of the clearing house, as before stated, the plaintiff was required to return the draft before 3 o'clock on the day on which it was presented. The legal situation of the plaintiff bank does not, however, depend upon these rules of the clearing house. As a matter of fact, the draft was not returned before 3 o'clock of the day upon which it was paid. Whether or not a return before 3 o'clock would, under the rules of the clearing house, have exonerated the plaintiff, it is not necessary for us to determine. It was, we think, at least a question for the jury to determine whether or not, with the knowledge of the facts which had been communicated to the officers of the plaintiff, it was culpable negligence on their part to receive this draft as they did on the morning of June 14th, at about half past 10 o'clock, without examination or verification, and to retain it until after 2 o'clock; and if the jury should find in the affirmative, and that the defendant made the payment to its depositor relying upon the acceptance and payment of the draft by the plaintiff, the defendant would be exonerated from liability for anything more than the amount remaining in its hands to the credit of the fraudulent depositor, when notice of the forgery was given to the defendant.

As application to submit these questions to the jury was denied by the court, the judgment should be reversed, and a new trial ordered, with costs to the appellant to abide the event. All concur.

NOTE.

Payment of Raised Checks—Right to Recover.—As a bank can be held bound only to know the signature of its depositor, and not the handwriting in the body of a check, money paid in good faith and without negligence on an altered check may be recovered back from the party receiving it.

United States.—*Espy v. Cincinnati Bank*, 18 Wall. (U. S.) 614.

Alabama.—*Birmingham Nat. Bank v. Bradley*, 103 Ala. 109.

California.—*Redington v. Woods*, 45 Cal. 406, 13 Am. Rep. 190.

Indiana.—*Parke v. Roser*, 67 Ind. 500, 33 Am. Rep. 102.

Louisiana.—*Merchants' Bank v. Exchange Bank*, 16 La. 457.

Nebraska.—*Orleans First Nat. Bank v. State Bank*, 22 Neb. 769

Corn Exchange Nat. Bank *v.* Solicitors' Loan & Trust Co

New York.—National Park Bank *v.* New York Ninth Nat. Bank, 46 N. Y. 77, 7 Am. Rep. 310; Bank of Commerce *v.* Union Bank, 3 N. Y. 230; White *v.* Continental Nat. Bank, 64 N. Y. 316, 21 Am. Rep. 612; National Bank of Commerce *v.* National Mechanics' Banking Assoc., 55 N. Y. 211; Marine Nat. Bank *v.* National City Bank, 59 N. Y. 67, 17 Am. Rep. 305; U. S. National Bank *v.* National Park Bank, 59 Hun (N. Y.) 495; National Bank of Commerce *v.* Manufacturers', etc., Bank, 122 N. Y. 367.

Pennsylvania.—Rapp *v.* National Security Bank, 136 Pa. St. 426.
Texas.—City Bank *v.* Houston First Nat. Bank, 45 Tex. 203.

CORN EXCHANGE NAT. BANK

v.

SOLICITORS' LOAN & TRUST CO. *et al.*

(*Supreme Court of Pennsylvania, Nov. 7, 1898.*)

Cashing Check of Insolvent—Bill to Recover Money from Assignee—Trust.—A bank to accommodate a trust company accepted its check in exchange for the face value of the check in \$2 bills in a package, at a time when the officers of the trust company knew that it was insolvent. The trust company made an assignment on the next day, and turned over the package of bills to its assignee. The bank filed a bill in equity praying that the assignee be ordered to restore such package to it unopened. *Held*, that such relief should have been granted, the package of money having been impressed with a trust, the title never having passed from the bank, because the fact that the trust company's doors were kept open on that day was a misrepresentation to the public as to its financial condition.

APPEAL by plaintiff from Philadelphia county court of common pleas. *Reversed.*

A. I. Phillips, J. Levering Jones, Hampton L. Carson, and Dimmer Beeber, for appellants.

Richard S. Hunter, for appellees.

DEAN, J. The plaintiff and defendant—one as a bank, the other as a trust company—each did business in Philadelphia. The bank frequently accommodated the trust company with currency of the various denominations on request, and without charge. On January 2, 1896, the trust company, by telephone, asked the bank

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for \$2,000 in \$2 bills, and on a favorable response sent its check for that amount on the Fourth Street National Bank, where it had funds to meet it, by messenger, who returned with the bills put up in packages. On the next day, the trust company, without opening its doors, failed, and made an assignment for benefit of creditors, of which the Fourth Street National had immediate notice. The Corn Exchange Bank, the plaintiff, in the regular course of business, sent the check to the clearing house before 8:30 on the morning of the 3d, but the Fourth Street National, because of the assignment, refused to honor it, and the Corn Exchange the same day was compelled to take it up. The \$2,000 received by the trust company remained in the package in its possession, unbroken, and was turned over to its assignee. The plaintiff then filed this bill, setting out the foregoing facts, and prayed for an order on the assignees to restore to it the unopened package. The assignees filed demurrer, averring that no special trust relation calling for the interposition of equity was established by the foregoing facts, and, further, that plaintiff had an adequate remedy at law. The court below sustained the demurrer, and dismissed the bill, from which decree we have this appeal.

From the averments of the bill, which are admitted by the demurrer, and the statements in the deed of assignment, the trust company was insolvent on the 2d of January, when the transaction took place, and it received the plaintiff's money, and the officers of the company were aware of its condition. Keeping its doors open on that day was, whether intentional or not, a representation to the public of solvency. Whether they still hoped, on that day, by some means to recuperate, and avoid closing, is not material; the fact of insolvency on that day remains. There is no difference in principle between this transaction and that of a depositor who leaves his money with the bank a few hours before it suspends. The acceptance of the money under such circumstances is a fraud upon the depositor, and if it has not been used or mixed with

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the common funds, and can be identified, he can maintain replevin for it. *Furber v. Stephens*, 35 Fed. 17. In *Craigie v. Hadley*, 99 N. Y. 131, 1 N. E. 537, it was held that, where drafts were deposited for collection with a bank which failed the next day, the title did not pass out of the depositor, and he could recover. It will be noticed, no question of confusion of assets arises in this case. The very package delivered by plaintiff remains in possession of the assignees. It would be highly inequitable to pass over to the creditors of the insolvent trust company plaintiff's money because defendants acquired possession of it by a misrepresentation of solvency. Besides, plaintiff was not a customer of the trust company, and did not adopt it as a convenient place of deposit, but, as a pure accommodation, accepted a worthless check for the \$2,000. We say worthless, because in the course of business it could not be presented until the insolvency of the drawer became known, and the fund on which it had been drawn had constructively passed to the assignee for the benefit of creditors. The jurisdiction of equity is sustainable, because, under the facts, the package of money is impressed with a trust. The title never passed from plaintiff, because the possession was obtained by a plainly-implied misrepresentation. The decree is reversed, and it is ordered that the assignees deliver to plaintiff the package or packages of \$2 bills, amounting to \$2,000, as in plaintiff's bill averred; costs to be paid by appellees.

AMERICAN TRUST & SAVINGS BANK

v.

AUSTIN *et al.**(Supreme Court of New York, Special Term, Dec. 1898.)*

Cashing Drafts Accompanied by Bills of Lading—Attaching Creditors*—Title to Goods.—Where a bank cashed drafts, which were

*See note at end of case.

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accompanied by the bills of lading, drawn upon the consignee of a shipment of goods, it became the owner of the drafts and bills of lading, and of the goods as covered by the latter, and, as against an attaching creditor, entitled to the proceeds of the goods, the fact that the bank, as a general rule, in receiving checks or drafts on deposit or for collection, acted only as the agent for the depositor, being immaterial.

Action by the American Trust & Savings Bank against Oscar F. Austin and others. Judgment for plaintiff.

D. R. Cobb, for plaintiff.

H. E. Miller, for defendants.

HISCOCK, J. This action became one of interpleader and equity through the fact that one Thalheimer, holding some moneys claimed by the plaintiff, and also by the present defendants, was allowed to pay the same into court, and have substituted as defendants herein said present defendants. One Hoffmeyer shipped from Chicago to said Thalheimer, at Syracuse, two lots of butter. He drew two drafts upon said Thalheimer for the value thereof claimed by him, being nearly \$500. Upon said drafts, and the bills of lading for the butter so shipped, as aforesaid, he obtained from plaintiff the full amount of the drafts, less exchange, etc. Plaintiff, having advanced the money upon the drafts and bills of lading, forwarded the same through its correspondents to Syracuse, for collection, but payment was refused by Thalheimer, upon the ground that the butter was not up to the agreed standard. Subsequently, however, he sold the butter, and received the proceeds thereof, amounting to the sum of \$476, which has now been paid into court, as aforesaid. While the proceeds of said butter, either in the form of accounts or moneys, were in his hands, the defendants other than Austin obtained an attachment against Hoffmeyer, which Austin, as sheriff, purported to levy upon such avails of the butter. Various questions are raised in the case, but, in view of the decision reached upon the principal one litigated, it will be unnecessary to consider the others. It is claimed by the plaintiff

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that it discounted the drafts drawn by Hoffmeyer, as aforesaid, upon the strength of the bills of lading accompanying the same, and that by virtue thereof it became the owner of the drafts, and, to the extent of the amount thereof, at least, the owner of the goods covered by the bills of lading, and the proceeds thereof. Upon the other hand, it is insisted by the defendants that the plaintiff received said drafts and bills of lading for collection merely, or, at least, as the agent of Hoffmeyer, and did not become the owner thereof. A consideration of all the evidence upon this subject, which it is unnecessary to recapitulate at length, leads me to the conclusion that the plaintiff's contention is the correct one, and that it did become the owner of the drafts and bills of lading, and of the goods as covered by the latter. No serious contention is raised that plaintiff passed the entire amount of the drafts, when it took them, accompanied by the bills of lading, to the credit of Hoffmeyer in his account, and they were subsequently drawn out by him. Defendants' contention that plaintiff was acting simply as collecting agent for Hoffmeyer is based largely upon a general rule adopted by plaintiff in its banking business, to the effect that, in receiving checks or drafts on deposit or for collection, it acted only as agent for the depositor, and, beyond carelessness in selecting agents at other points, and in forwarding to them, it assumed no liability. This rule was made and adopted by plaintiff, and of course it could, if it saw fit, in connection with any transaction, waive it, and make the transfer of drafts to it absolute and unconditional. But, even if it did not do this in this transaction, the rule does not seem to me to have the effect claimed by defendants. If plaintiff discounted, and thereby became the absolute owner of, a draft for a customer, and the draft for any reason was not paid, it would naturally expect to charge it back to the customer's account, or compel him in some way to make it good. In the case of a draft so discounted, and payable in a distant city, it would be necessary for the plaintiff to utilize a line

Note

of collecting agents, and any one of them, through failure or insolvency, might defeat the collection of the draft, and place plaintiff where it might desire to charge the same back against its customer. And, as I look at it, this rule was intended to cover that part of its transactions with its customers, and, as to those acts, to make the customer responsible, and relieve the bank from liability, except within the limits named by the rule. Findings and judgment in favor of plaintiff, with costs, may be prepared and settled, upon one day's notice, if not agreed upon.

Judgment for plaintiff, with costs.

NOTE.

Bills of Lading—Rights of Pledgee.—Where the consignor draws upon his consignee for the purchase-money, and the draft, with bill of lading attached, is indorsed or transferred to some one who discounts the bill of exchange, a special property in the goods thereby passes to the transferee, subject to be divested by the acceptance and payment of the draft. *Michigan Cent. R. Co. v. Phillips*, 60 Ill. 190; *Rumsey v. Nickerson*, 35 Ill. App. 188; *Illinois Cent. R. Co. v. Southern Bank*, 41 Ill. App. 287; *Halsey v. Warden*, 25 Kan. 128; *Cairo First Nat. Bank v. Crocker*, 111 Mass. 163; *Green Bay First Nat. Bank v. Dearborn*, 115 Mass. 219; *Stollenwerck v. Thacher*, 115 Mass. 224; *Chicago Fifth Nat. Bank v. Bayley*, 115 Mass. 228; *Hathaway v. Haynes*, 124 Mass. 311; *Davenport Nat. Bank v. Homeyer*, 45 Mo. 145, 100 Am. Dec. 363; *Midland Nat. Bank v. Missouri, etc., R. Co.*, 1 Mo. App. Rep. 417; *Skilling v. Bollman*, 6 Mo. App. 76; *Rochester Bank v. Jones*, 4 N. Y. 497, 55 Am. Dec. 290; *Cincinnati First Nat. Bank v. Kelly*, 57 N. Y. 37; *City Bank v. Rome, etc., R. Co.*, 44 N. Y. 136; *Merchants Bank v. Union R., etc., Co.*, 69 N. Y. 379; *Commercial Bank v. Pfeiffer*, 22 Hun (N. Y.) 327, 108 N. Y. 242; *Cayuga County Nat. Bank v. Daniels*, 47 N. Y. 631; *Syracuse First Nat. Bank v. New York Cent., etc., R. Co.*, 85 Hun (N. Y.) 160; *Indiana Nat. Bank v. Colgate*, 4 Daly (N. Y.) 41; *Marine Bank v. Wright*, 48 N. Y. 1; *Emery v. Irving Nat. Bank*, 25 Ohio St. 360, 18 Am. Rep. 299; *Holmes v. German Security Bank*, 87 Pa. St. 525, 33 Am. Rep. 745; *Holmes v. Bailey*, 92 Pa. St. 57; *Richardson v. Nathan*, 167 Pa. St. 513; *Tilden v. Minor*, 45 Vt. 196; *Neill v. Rogers Bros. Produce Co.* (W. Va. 1895), 23 S. E. Rep. 702.

The pledgee of the bill of lading received thus in good faith from a third person for value gets a good title against the consignor's creditors. *Forbes v. Boston, etc., R. Co.*, 133 Mass. 154; *Hathaway v. Haynes*, 124 Mass. 311; *Pettitt v. First Nat. Bank*, 4 Bush (Ky.) 334.

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OXFORD LAKE LINE

v.

FIRST NAT. BANK OF PENSACOLA.

(*Supreme Court of Florida, Nov. 5, 1898.*)

Banks and Banking—Collection of Bills of Exchange Having Bill of Lading Attached.*—In the absence of special instructions, if a time bill of exchange with bill of lading attached be sent to an agent for collection, there is an implied obligation upon the agent to hold the bill of lading until the bill of exchange is either accepted or paid, according to circumstances; and he cannot deliver the bill of lading without requiring the one or the other.

Principal and Agent—Ambiguous Authority.*—Where the instructions to an agent are couched in such uncertain terms as to be reasonably susceptible of two different meanings, and the agent in good faith and without negligence adopts one of them, the principal cannot be heard to assert, either as against the agent or as against third persons who have in good faith and without negligence relied upon the same construction, that he intended the authority to be executed in accordance with the other interpretation.

Same.—If the principal's instructions to his agent will reasonably admit of two different interpretations, the agent is not thereby authorized to disregard the instructions entirely, and substitute his own judgment therefor; but, if he acts at all in such cases, he must follow one of the interpretations reasonably derivable from the uncertain terms of the instruction.

Same—Deviation from Instructions.*—It is the privilege of the principal to give instructions, and the duty of the agent to obey them, and any unauthorized deviation from or neglect of the principal's instructions, whereby damage results to him, will entitle him to an action against the agent, although the latter, in deviating from or neglecting to obey instructions, acted in good faith, and honestly believed he was acting for the best interests of his principal.

Same—Ratification.*—Express or implied ratification of the unauthorized act of an agent must, in order to bind the principal, be with full knowledge of all material facts; and, if material facts be either suppressed or unknown, the ratification is invalid, because founded in fraud or mistake.

Same—Same—Burden of Proof.—The principal has a right to presume that his agent has followed instructions, and has not exceeded his authority, and generally it does not devolve upon him to make inquiries as to the facts. Whenever it is sought to bind him upon the ground of ratification either express or implied, it must be shown

*See notes at end of case.

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that he ratified upon full knowledge of all material facts, or that he was willfully ignorant, or purposely refrained from seeking information, or that he intended to adopt the unauthorized act at all events, and under whatever circumstances.

Pleading.—A bad replication is a good answer to a bad plea.

(Syllabus by the Court.)

ERROR by plaintiff to Escambia county circuit court.
Reversed.

On October 25, 1892, plaintiff in error instituted suit against defendant in error in the circuit court of Escambia county; the declaration, filed November 7, 1892, alleging that the First National Bank of Anniston, state of Alabama, did on August 1, 1892, send and remit to defendant a bill of lading of the Louisville & Nashville Railroad Company for a dummy engine and two coaches, shipped on said railroad, at Anniston, Ala., by the plaintiff, to be delivered at Pensacola, state of Florida, and accompanying said bill of lading was a draft drawn by the plaintiff on the Pensacola Terminal Company, in favor of H. A. Tracy, cashier of said First National Bank of Anniston, for the sum of \$1,650, dated July 30, 1892, payable 30 days after date, and also another for the sum of \$1,650, payable at sight; that said First National Bank of Anniston did, at the time of sending said bill of lading and drafts, instruct defendant not to deliver said bill of lading to said Pensacola Terminal Company without the acceptance by the said Pensacola Terminal Company of said first above mentioned draft, as well as the payment of the last above mentioned draft, but that defendant, disregarding its duty in that behalf, did deliver said bill of lading to said Pensacola Terminal Company upon the payment of said sight draft, without procuring from said Pensacola Terminal Company an acceptance by it of said 30-day draft, and did return said 30-day draft to said First National Bank of Anniston without an acceptance of the same by the said Pensacola Terminal Company, whereby defendant became liable to pay said First National Bank of Anniston the sum of \$1,650, the amount of said 30-day draft,

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which claim and demand for said sum, by reason of the matters set forth, the said First National Bank of Anniston did, on October 4, 1892, assign and transfer to plaintiff, wherefore, plaintiff says it is damaged in the sum of \$3,000.

On December 27, 1893, defendant, by leave of the court, filed two pleas to plaintiff's declaration, to each of which plaintiff replied specially. These replications were demurred to by defendant, upon the ground that they were not sufficient answers in law to the pleas. On January 11, 1894, the court sustained this demurrer; and, plaintiff declining to plead further, final judgment upon the demurrer was entered for defendant, from which this writ of error was taken to our June term, 1894.

The first plea alleged "that the said First National Bank of Anniston did not instruct this defendant in the manner and form as is alleged in said plea, but all of its instructions in connection with said drafts were embraced in the words 'deliver attached documents only on payment of drafts,' contained in a letter to defendant from the said First National Bank of Anniston, inclosing to the defendant the said bill of lading and drafts." The replication to this plea alleged "that the instructions accompanying said bill of lading and drafts were not such as stated in said plea, but were contained in a document partly in print and partly in writing, a copy of which document is hereto annexed as a part of this replication, which instructions, as presented by said document, are, in their legal tenor and effect, such as are alleged in said declaration." The document referred to, omitting head as immaterial, was as follows:

"Anniston, Ala., Aug. 1st, 1892.

"First Nat'l Bank, Pensacola, Fla.—Dear Sir: I inclose for collection and remittance No.——. Deliver attached documents only on payment of drafts.

5178 N. P. 1650

5179 N. P. For acceptance..... 1650

"Respectfully, yours,

"H. A. Young, Cashier."

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The second plea alleged that the drafts mentioned in the declaration were drawn by the plaintiff upon the Pensacola Terminal Company, in pursuance of a written contract between the plaintiff and the Pensacola Terminal Company for the sale of the engine and cars mentioned in the declaration, a copy of the contract being attached to and made a part of the plea. The plea further alleged that upon presentation of the drafts to the Pensacola Terminal Company, it declined to pay the sight draft and accept the 30-day draft, because, as it alleged, the property was not in the condition provided for by the contract, but offered to pay the sight draft, and to leave the amount of the balance of payment for said property open for adjustment between it and the plaintiff, if the said bill of lading should be surrendered to it, and defendant, believing that its instructions from the First National Bank of Anniston authorized it so to do, surrendered said bill of lading to the Pensacola Terminal Company upon its payment of the sight draft, which payment was made on the 6th day of August, 1892; that, on said day, defendant notified the First National Bank of Anniston that the said \$1,650 sight draft had been paid, and that the said \$1,650 30-day draft had not been accepted, and on the same day remitted the said \$1,650 received from the said Pensacola Terminal Company to the First National Bank of Anniston, which remittance was received by said First National Bank of Anniston on August 7th, 1892; that on August 8th, 1892, the defendant returned to the First National Bank of Anniston the unaccepted draft which was received by the latter on August 9, 1892; that on August 12, 1891, the defendant, although the said First National Bank of Anniston knew the said fact before, notified the said First National Bank of Anniston of the refusal of the Pensacola Terminal Company to accept the said 30-day draft as aforesaid, and of defendant's consequent action in surrendering to it the said bill of lading without the acceptance of said draft; that plaintiff knew the facts before stated before the assignment to it alleged in the declaration;

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that neither the First National Bank of Anniston nor the plaintiff had ever notified the Pensacola Terminal Company of any repudiation of the action of defendant in delivering the bill of lading, nor had they ever taken any action against the Pensacola Terminal Company to recover back the said property, although the same had ever since remained the property of the Pensacola Terminal Company, and in its possession, nor ever offered to return or ever returned to the defendant or to the Pensacola Terminal Company the said sum of \$1,650, received by the First National Bank of Anniston, as aforesaid. The contract referred to in this plea was dated May 19, 1892, and thereby the plaintiff agreed to deliver to the Pensacola Terminal Company, free on board cars on the Louisville & Nashville Railroad Company's tracks at Anniston, Ala., a certain dummy equipment owned by the plaintiff, consisting of one H. K. Porter & Co. dummy engine, No. 1,087, one Brill dummy coach, and one La Clede dummy coach, in condition therein very minutely specified, all to be put in first-class repair and condition, subject to the inspection and approval of two persons therein named. In consideration thereof, the Pensacola Terminal Company agreed to pay plaintiff \$3,300,—one half; or \$1,650, cash, on presentation at Pensacola of draft for the amount, with bill of lading for the engine and two cars attached, payable in New York exchange; and the other one-half to be paid by a 30 day acceptance, payable in New York exchange. The replication to this plea alleged that there was no foundation for the alleged belief of defendant that it was authorized to deliver said bill of lading without a previous acceptance of the 30-day draft, because the contrary plainly appears in the writing which accompanied the drafts and bill of lading, which writing was made a part of the replication, and was the same as that referred to and made a part of the replication to the first plea; wherefore the replication alleged the defendant did deliver said bill of lading in the face of the plain instructions in said writing contained. It was further alleged that defendant did

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not, at the time of sending to the first National Bank of Anniston the proceeds of said sight draft, and notifying it of the nonacceptance of said 30-day draft, also notify said Bank of Anniston that defendant had surrendered said bill of lading, but did suppress and conceal said fact, as appears from the telegram and writing thereto annexed as parts of the replication. The telegram referred to, dated August, 6, 1892, addressed to the "First Nat'l Bank" (of Anniston), reads: "Draft paid; remitted to-day, but thirty days not yet accepted." The writing referred to was dated August 6, 1892, and reads as follows:

"Your favor of 7/20 received, with stated inclosure. We inclose our check on New York, \$1,650.00.

"Exchange, _____.

"Collection charges, _____.

"\$_____.

"In payment of the items stated below.

"Yours, truly, J. S. Leonard, Cashier.

"Per J. M. Frater.

No. 106.

Oxford L. Line.

5158 Pensacola Ter. Co. 1650.

We enter 5159 Pensacola Ter. Co. 1650.

"We beg to confirm our telegram advising remittance to you today."

The errors assigned are that the court erred—First, in sustaining defendant's demurrer to plaintiff's replication to defendant's first plea; second, in sustaining defendant's demurrer to plaintiff's replication to defendant's second plea.

Richard L. Campbell and *John C. Avery*, for plaintiff in error.

Blount & Blount, for defendant in error.

CARTER, J. (after stating the facts). No question as to the measure of plaintiff's damages is here involved or argued. It is conceded by all parties that the plaintiff's declaration alleged a cause of action, but it is insisted by defendant in error that defendant's pleas each presented defenses to the declaration, the effect of which was not avoided by the plaintiff's replications thereto.

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1. We think the plaintiff's replication to the first plea presented a complete answer thereto. In the absence of any special instructions, if a time bill of exchange with bill of lading attached be sent to an agent for collection, there is an implied obligation upon the agent to hold the bill of lading until the bill of exchange is either accepted or paid, according to circumstances. He cannot deliver without requiring the one or the other. *Commercial Bank of Manitoba v. Chicago, St. P. & K. C. Ry. Co.*, 160 Ill. 401, 43 N. E. 756; *Bank v. Cummings*, 86 Tenn. 609, 18 S. W. 115; *National Bank of Commerce of Boston v. Merchants' Nat. Bank of Memphis*, 91 U. S. 92; *Dows v. Bank*, *Id.* 618; *Schoregge v. Gordon*, 29 Minn. 367, 13 N. W. 194; *Port. Bills, Lad.* § 523 *et seq.*; *Daniel, Neg. Inst.* § 1734b. In this case, however, there were special instructions. Two bills—one at sight, the other at 30 days—were sent to defendant for collection and remittance, with instructions to procure acceptance of the time bill, and to “deliver attached documents [the bill of lading] only on payment of drafts.” If there is any ambiguity about these instructions, it consists in an uncertainty as to whether the bill of lading was to be delivered upon payment of the sight draft and acceptance of the other, or upon payment of both. There certainly was no authority given thereby to deliver the bill of lading upon payment of the sight draft only. It is unquestionably true, as contended by defendant in error, that where the instructions to an agent are couched in such uncertain terms as to be reasonably susceptible of two different meanings, and the agent in good faith and without negligence adopts one of them, the principal cannot be heard to assert, either as against the agent or as against third persons who have in good faith and without negligence relied upon the same construction, that he intended the authority to be executed in accordance with the other interpretation. *Mechem, Ag.* § 315. But, because an agent's instructions

Banks and Bank-
ing—Collection of
Bills of Exchange
Having Bill of
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Principal and
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will admit of different interpretations, he is not thereby authorized to disregard them entirely, and substitute his own judgment in the place thereof. If he acts at all in such cases, he must follow one of the interpretations reasonably derivable from the uncertain terms of the instructions. In this case defendant did neither; but, on the contrary, substituted its own ideas of what was proper under the circumstances, thereby acting directly antagonistic to its instructions. The replication was a good answer to the first plea, and the demurrer should have been overruled. Same.

2. It is argued with great confidence and ability by counsel for defendant in error that, under the facts disclosed by the second plea and replication, the Anniston bank ratified the defendant's act in surrendering the bill of lading without requiring acceptance of the 30-day draft; and, in support of this view, it is claimed that the Anniston bank received the \$1,650 proceeds of the sight draft with sufficient notice to put it upon inquiry as to the surrender of the bill of lading, and retained the money after full knowledge that the bill of lading had been surrendered. In considering this question, we must bear in mind that the defendant was acting as an agent of limited powers over a specific subject-matter. The subject-matter consisted of two drafts and a bill of lading. Its powers were defined by special instructions, *viz.* to deliver the bill of lading upon payment of one draft and acceptance of the other. The contract between plaintiff and the Pensacola Terminal Company was not attached to the drafts, nor was defendant given any power or authority over it, nor had plaintiff held out to defendant or the terminal company in any way that defendant was authorized to exercise any authority over this contract, nor was there anything in the nature of the bill of lading, drafts, or instructions transmitting them to defendant, indicating that they had any connection with plaintiff's contract with the terminal company. The defendant's duties were plain and simple; the extent of its authority

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clearly defined by specific instructions. It is the privilege of the principal to give instructions, and the duty of his agent to obey them. Any unauthorized deviation from or neglect of the principal's instructions, whereby damage results, will entitle him to an action against the agent, even though the latter, in deviating from or neglecting to obey instructions, acted in good faith, and honestly believed he was acting for the best interest of his principal. *Mechem Ag.* §§ 474-477; *Story, Ag.* §§ 192, 217c; *Walker v. Walker*, 5 Heisk. 425; *Bank of Owensboro v. Western Bank*, 13 Bush, 526; *Hall v. Storrs*, 7 Wis. 253. When the defendant, without authority, delivered the bill of lading which enabled the terminal company to get possession of the plaintiff's property without acceptance of the time draft, it disobeyed plain instructions, and even though done under the honest belief, as alleged in the plea, thereby subjected itself to liability, unless, as it claims, its acts were subsequently ratified by the plaintiff. The plea does not claim an express ratification of defendant's act. It alleges subsequent conduct on the part of plaintiff which it is claimed constitutes an implied ratification, viz. the acceptance and retention of the proceeds of the sight draft collected at the time the bill of lading was delivered to the terminal company. Express or implied ratification of the unauthorized act of an agent must, in order to bind the principal, be with full knowledge of all material facts. If material facts be either suppressed or unknown, the ratification is invalid, because founded in mistake or fraud. *Town of Madison v. Newsome*, 39 Fla. 149, 22 South. 270; *Bell v. Cunningham*, 3 Pet. 69; *Bank of Owensboro v. Western Bank*, 13 Bush, 526; *Humphrey v. Havens*, 12 Minn. 298 (Gil. 196); *Bohart v. Oberne*, 36 Kan. 284, 13 Pac. 388; *Martin v. Hickman*, 64 Ark. 217, 41 S. W. 852; *Express Co. v. Trego*, 35 Md. 47; *Dean v. Bassett*, 57 Cal. 640; *Navigation Co. v. Dandridge*, 8 Gill & J. 248 (text, 323); *Vincent v. Rather*, 31 Tex. 77; *Bank v. Drake*, 29 Kan. 311; *Bennecke v. Insurance Co.*, 105

Same—Deviation
from Instructions.

Same—Ratification.

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U. S. 355; *Owings v. Hull*, 9 Pet. 607; *Davis v. Talbot*, 137 Ind. 235, 36 N. E. 1098; *Holm v. Bennett*, 43 Neb. 808, 62 N. W. 194; *Baldwin v. Burrows*, 47 N. Y. 199; *Wheeler v. Sleigh Co.*, 39 Fed. 347; *Clark v. Clark*, 59 Mo. App. 532; *Bryant v. Moore*, ^{Same—Same—}_{Burden of Proof.} 26 Me. 84. Generally speaking, it does not devolve upon the principal to make inquiries as to the facts. He has a right to presume that his agent has followed instructions, and has not exceeded his authority. Whenever he is sought to be held liable on the ground of ratification, either express or implied, it must be shown that he ratified upon full knowledge of all material facts, or that he was willfully ignorant, or purposely refrained from seeking information, or that he intended to adopt the unauthorized act at all events, under whatever circumstances. *Combs v. Scott*, 12 Allen, 493; *Marsh v. Joseph* [1897] 1 Ch. Div. 213; *Lime Co. v. Green*, L. R. 7 C. P. 43; *Mechem*, Ag. § 129. Tested by these rules, the second plea was bad, and, even if the replication was itself bad, it was a good answer to a bad plea. *Wade v. Doyle*, 17 Fla. 522. The plea admitted that the terminal company paid the sight draft on August 6th, after it had notified defendant that the property embraced in its contract with plaintiff was not in the condition provided by said contract, and that the draft was paid upon the understanding that the bill of lading was to be surrendered without acceptance of the time draft, and that the amount of the balance of payment for the property be left open for future adjustment between the terminal company and the plaintiff. By this course the defendant not only violated its instructions as a special agent, but it took upon itself to make a new contract for the plaintiff, without the slightest semblance of authority to do so. Yet subsequent to this transaction defendant telegraphed the Anniston bank: "Draft paid; remitted to-day, but thirty days not yet accepted;" and later, on the same day, defendant remits to cover sight draft, and writes regarding the other draft, "We enter," with no intimation whatever that the time draft would

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not be accepted, although it had then been dishonored, and the bill of lading delivered. Neither was there the slightest intimation in this letter or telegram that the bill of lading had been surrendered, or that defendant had assumed to change the contract between plaintiff and the terminal company, and the expressions "not yet accepted," and "We enter," relative to the time draft, were calculated to convey the impression that the draft would be accepted, although defendant then knew it would not. Under these circumstances the acceptance of the proceeds of the sight draft would not become the basis of a claim of ratification, for plaintiff then had no knowledge of any departure from instructions by the defendant, but, on the contrary had every reason to suppose that they were being complied with. The plea alleges that defendant returned the unaccepted draft to the Anniston bank on the 8th of August, and that on the 12th it notified that bank

Pleading. of the refusal of the terminal company to accept the time draft, and of defendant's consequent action in surrendering the bill of lading without such acceptance; but it is nowhere alleged that defendant or any one else ever informed plaintiff at any time that the bill of lading was surrendered upon the understanding that the amount of the balance due under plaintiff's contract with the terminal company was to be, not the definite amount to be evidenced by the time draft, but such amount only as might be determined upon a future adjustment. This was a very material matter for the plaintiff to know in determining whether it would ratify what its agent had assumed to do for it. Plaintiff might well ratify the release of its security, *viz.* the delivery of the property to the terminal company, without requiring as a prerequisite the acceptance of the time draft, looking to its remedy upon the original contract, which would have been ample to secure the full amount evidenced by the time draft if the property had been inspected and approved by the persons named in the contract; while it might very promptly have repudiated the unauthorized acts

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of its agent had it known that such agent had not only released its security, but had actually given the terminal company an advantage, by leaving the balance due to be ascertained, not in accordance with the contract, but upon some future adjustment. Consequently, plaintiff did not ratify defendant's acts by retaining the proceeds of the sight draft, in ignorance of this material fact. There are none of the elements of an estoppel set up in this plea, as contended by the defendant, and an essential element of ratification is wanting. We are therefore of opinion that the demurrers to plaintiff's replications should have been overruled.

The judgment is reversed, with directions to the circuit court to enter an order overruling the demurrers to plaintiff's replications, and for such further proceedings as may be conformable to law.

NOTES.

Bills of Lading—Surrender before Payment of Draft.—Where the consignor has delivered a bill of lading with draft attached, it is presumed that the bill is given as security for the acceptance of the draft. *Dows v. National Exch. Bank*, 91 U. S. 618. Unless it is expressly stipulated that it is given as security for the collection. *Schuchardt v. Hall*, 36 Md. 590; *People's Nat. Bank v. Stewart*, 3 Pugs. & Bur. (N. B.) 268.

Therefore if the draft is accepted by the consignee, the pledgee, in the absence of other instruction by the consignor, may surrender the bill. *National Bank v. Merchants' etc., Bank*, 91 U. S. 92; *Cayuga Co. Nat. Bank v. Daniels*, 47 N. Y. 631; *Marine Bank v. Wright*, 48 N. Y. 1; *Mears v. Naples*, 4 Houst. (Del.) 62; *Lanfear v. Blossman*, 1 La. Ann. 148; *Security Bank v. Luttgen*, 29 Minn. 363; *Schuchardt v. Hall*, 36 Md. 590; *Wis. M. & F. Ins. Co. v. Bank of B. N. A.*, 21 U. C. Q. B. 284; *Clark v. Bank of Mont.*, 13 Grant's Ch. (Can.) 211; *Goodenough v. City Bank*, 10 U. C. C. P. 51.

In *National Bank v. Merchants' Nat. Bank*, 91 U. S. 92, the court by STRONG, J., said: "We feel justified in saying that, in our opinion, no respectable case can be found in which it has been decided that when a time draft has been drawn against a consignment to order, and has been forwarded to an agent for collection with the bill of lading attached, without any further instructions, the agent is not justified in delivering over the bill of lading on the acceptance of the draft."

There is in England a custom to hold the bill of lading until payment of the draft, but it is not encouraged. *Coventry v. Gladstone*, L. R., 4 Eq. 493; *Gurney v. Behrend*, 3 El. & Bl. 622.

Where the consignor has given instruction as to the surrender of

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the bill, the pledgee must be guided thereby. *Dows v. National Exch. Bank*, 91 U. S. 618; *Stollenwerck v. Thatcher*, 115 Mass. 224; *Pease v. Gloahee, L. R.*, 1 P. C. 219; *Gurney v. Behrend*, 3 El. & Bl. 622.

Parol evidence is admissible to show an agreement between the consignor and pledgee that the bill of lading should not be delivered to the consignee until the payment of the draft. *Security Bank v. Luttgen*, 29 Minn. 363.

Principal and Agent—Duty of Agent Where Authority is Ambiguous.—Where the authority is ambiguous and capable of two constructions, it should be construed according to the usual course of dealing in such matters. *Pole v. Leask*, 28 Beav. 574.

But if the agent has *bona fide* and in good faith adopted and acted upon one construction, it will bind the principal. See *Brown v. M'Gran*, 14 Pet. (U. S.) 480; *Minnesota Linseed Oil Co. v. Montague*, 65 Iowa 67; *Mattocks v. Young*, 66 Me. 459; *Foster v. Rockwell*, 104 Mass. 167; *Mechanics' Bank v. Merchants' Bank*, 6 Met. (Mass.) 13; *Mann v. Laws*, 117 Mass. 293; *Johnson v. Jones*, 4 Barb. (N. Y.) 369; *Winnie v. Niagara F. Ins. Co.*, 91 N. Y. 185; *Bessent v. Harris*, 63 N. Car. 542; *Longmire v. Herndon*, 72 N. Car. 629.

The principal should give his instructions in clear and unambiguous terms, and is himself responsible for any error arising from ambiguous instructions. *Ireland v. Livingston, L. R.* 5 H. L. 416.

Same—Fidelity to Instructions.—Where an agent fails or refuses to follow the instructions of his principal, the latter may hold him liable for any loss or damage resulting. *Sawyer v. Mayhew*, 51 Me. 398; *Amory v. Hamilton*, 17 Mass. 103; *Thompson v. Stewart*, 3 Conn. 172, 8 Am. Dec. 168; *Austill v. Crawford*, 7 Ala. 335; *Short v. Skipwith*, 1 Brock. (U. S.) 103; *Hasselman v. Carroll*, 102 Ind. 153. And see *Heinemann v. Heard*, 50 N. Y. 27; *Milwaukee County v. Hackett*, 21 Wis. 613; *Rundle v. Moore*, 3 Johns. Cas. (N. Y.) 36.

It is his first duty to adhere faithfully to his instructions in all cases to which they can be properly applied, and if he neglects, exceeds, or violates them, he is responsible for all losses which are the natural consequence of his acts. *Whitney v. Merchants' Union Express Co.*, 104 Mass. 152, 6 Am. Rep. 207; *Fuller v. Ellis*, 39 Vt. 345, 94 Am. Dec. 327; *Ward v. Warfield*, 3 La. Ann. 468.

And the fact that the agent intended to promote the principal's interest will not exonerate him. *Rechtscherd v. Accommodation Bank*, 47 Mo. 181; *Hardeman v. Ford*, 12 Ga. 205; *Ward v. Warfield*, 3 La. Ann. 468; *Ledoux v. Goza*, 4 La. Ann. 160; *Lowe v. Bell*, 6 La. Ann. 28; *Merritt v. Wright*, 19 La. Ann. 91; *Holmes v. Misroon*, 3 Brev. (S. Car.) 209; *Coker v. Ropes*, 125 Mass. 577.

If the instructions be free from ambiguity, and are positive and unqualified, they must be rigidly obeyed, if it be practicable; and no motive connected with the interest of the principal, however honestly entertained or wisely adopted, can excuse a breach of them. *Courcier v. Ritter*, 4 Wash. (U. S.) 549.

Same—Ratification.—Knowledge of all material facts and circumstances is an essential element to an effective ratification; without such knowledge the adoption of the acts of an unauthorized agent, or one who has exceeded his authority, will not bind the principal; but on the contrary, if he has given his assent while in ignorance of the facts of the case, he may, on being informed, disavow the unauthorized transaction.

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England.—Fitzgerald *v.* Dressler, 7 C. B. N. S. 374, 97 E. C. L. 374; Lewis *v.* Read, 13 M. & W. 834.

United States.—Owings *v.* Hull, 9 Pet. (U. S.) 607; Rust *v.* Eaton, 24 Fed. Rep. 830; Wheeler *v.* Northwestern Sleigh Co., 39 Fed. Rep. 347; Bosseau *v.* O'Brien, 4 Biss. (U. S.) 395; Pacific Rolling Mill Co. *v.* Dayton, etc., R. Co., 7 Sawy. (U. S.) 61.

Alabama.—Wheeler *v.* McGuire, 86 Ala. 398; Simon *v.* Johnson (Ala., 1895), 16 So. Rep. 884.

California.—Dean *v.* Bassett, 57 Cal. 640; Dupont *v.* Wertheman, 10 Cal. 354; Billings *v.* Morrow, 7 Cal. 171, 68 Am. Dec. 235; Miller *v.* Board of Education, 44 Cal. 166.

Colorado.—Field *v.* Small, 17 Colo. 386.

Georgia.—Turner *v.* Wilcox, 54 Ga. 593; De Vaughn *v.* McLeroy, 82 Ga. 687; Hardeman *v.* Ford, 12 Ga. 205; New Ebenezer Assoc. *v.* Cress Lumber Co., 89 Ga. 125; Mapp *v.* Phillips, 32 Ga. 72.

Illinois.—Kerr *v.* Sharp, 83 Ill. 199; Stein *v.* Kendall, 1 Ill. App. 101; Mathews *v.* Hamilton, 23 Ill. 470; Reynolds *v.* Ferree, 86 Ill. 570; Proctor *v.* Tows, 115 Ill. 138; Bensley *v.* Brockway, 27 Ill. App. 410.

Iowa.—Roberts *v.* Rumley, 58 Iowa 301; Tidrick *v.* Rice, 13 Iowa 214; White *v.* Morgan, 42 Iowa 113; Potter *v.* Harvey, 30 Iowa 502; Beebe *v.* Equitable Mut. L., etc., Assoc., 76 Iowa 129; Eggleston *v.* Mason, 84 Iowa 630.

Kansas.—Bohart *v.* Oberne, 36 Kan. 284; St. John, etc., Co. *v.* Cornwell, 52 Kan. 712.

Kentucky.—Fletcher *v.* Dysart, 9 B. Mon. (Ky.) 413.

Louisiana.—Delaney *v.* Levi, 19 La. Ann. 251; Mummy *v.* Haggerty, 15 La. Ann. 268.

Maine.—Bryant *v.* Moore, 26 Me. 84, 45 Am. Dec. 96; Morrell *v.* Dixfield, 30 Me. 157; Thorndike *v.* Godfrey, 3 Me. 429.

Maryland.—Bannon *v.* Warfield, 42 Md. 22; White *v.* Davidson, 8 Md. 169, 63 Am. Dec. 699; Hoffman Steam Coal Co. *v.* Cumberland Coal, etc., Co., 16 Md. 456, 77 Am. Dec. 311; Busby *v.* North America L. Ins. Co., 40 Md. 588, 17 Am. Rep. 634; Adams Express Co. *v.* Trego, 35 Md. 47.

Massachusetts.—Manning *v.* Leland, 153 Mass. 510; Chaffee *v.* Blaisdell, 142 Mass. 538; Murray *v.* C. N. Nelson Lumber Co., 143 Mass. 250; Thacher *v.* Pray, 113 Mass. 291; Dickinson *v.* Conway, 12 Allen (Mass.) 487; Combs *v.* Scott, 12 Allen (Mass.) 493; McIntyre *v.* Park, 11 Gray (Mass.) 102, 71 Am. Dec. 690.

Michigan.—Hurley *v.* Watson, 68 Mich. 531.

Minnesota.—Woodbury *v.* Larned, 5 Minn. 339; Humphrey *v.* Havens, 12 Minn. 298.

Mississippi.—Baker *v.* Byrne, 2 Smed. & M. (Miss.) 193; Meyer *v.* Baldwin, 52 Miss. 263.

Missouri.—Hyde *v.* Larkin, 35 Mo. App. 366; Steunkle *v.* Chicago, etc., R. Co., 42 Mo. App. 73.

Nebraska.—Dietz *v.* City Nat. Bank, 42 Neb. 584; Holm *v.* Bennett, 43 Neb. 808.

New Hampshire.—Gould *v.* Blodgett, 61 N. H. 115; Hovey *v.* Brown, 59 N. H. 114; Grant *v.* Beard, 50 N. H. 129.

New Jersey.—Gulick *v.* Grover, 33 N. J. L. 463, 97 Am. Dec. 728; Titus *v.* Cairo, etc., R. Co., 46 N. J. L. 393; Dowden *v.* Cryder, 55 N. J. L. 329; Dugan *v.* Lyman (N. J. Eq., 1895), 23 Atl. Rep. 657.

New Mexico.—Kirchner *v.* Laughlin (N. Mex., 1892), 23 Pac. Rep. 505.

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New York.—Keeler v. Salisbury, 33 N. Y. 648; Condit v. Baldwin, 21 N. Y. 219, 78 Am. Dec. 137; Rowan v. Hyatt, 45 N. Y. 138; Seymour v. Wyckoff, 10 N. Y. 213; Bell v. Day, 32 N. Y. 165; Thompson v. Craig, 16 Abb. Pr. N. S. (N. Y. Supreme Ct.) 29; Brass v. Worth, 40 Barb. (N. Y.) 648; Roach v. Coe, 1 E. D. Smith (N. Y.), 175; Hoffman v. Livingston, 46 N. Y. Super. Ct. 552; Craighead v. Peterson, 72 N. Y. 279, 28 Am. Rep. 150; Ritch v. Smith, 82 N. Y. 627; People v. Schuyler, 17 Hun (N. Y.) 106.

Pennsylvania.—Pittsburgh, etc., R. Co. v. Gazzam, 32 Pa. St. 340; Zoebisch v. Ranch, 133 Pa. St. 532; Merrick Thread Co. v. Philadelphia Shoe Mfg. Co., 115 Pa. St. 314; Moore v. Patterson, 28 Pa. St. 505.

Tennessee.—Williams v. Storm, 6 Coldw. (Tenn.) 203.

Texas.—Vincent v. Rather, 31 Tex. 77, 98 Am. Dec. 516; Battaglia v. Thomas, 5 Tex. Civ. App. 563.

Vermont.—Saville v. Welch, 58 Vt. 683.

Wisconsin.—Dodge v. McDonnell, 14 Wis. 553; Ætna Ins. Co. v. North Western Iron Co., 21 Wis. 458.

"No doctrine is better settled, both upon principle and authority, than this: that the ratification of an act of an agent previously unauthorized must, in order to bind the principal, be with a full knowledge of all the material facts. If the material facts be either suppressed or unknown, the ratification is treated as invalid, because founded in mistake or fraud." PER STORY, J., in Owings v. Hull, 9 Pet. (U. S.) 607.

DICKSON *et al.*

v.

BAKER *et al.*

(*Supreme Court of Minnesota, Jan. 5, 1899.*)

Savings Banks—Trustees—Depositors.*—The trustees of a savings association occupy a fiduciary relation to its depositors.

Bartering Office for Notes.—An agreement by a trustee, for a consideration moving to himself, to secure the election of another to the office of trustee, constitutes a breach of trust, and is void on grounds of public policy; and a promissory note given for such is void, being founded on an illegal consideration.

Same—Knowledge of Officers—Validity of Notes.—In this case the trustee took the notes, given in consideration of such agreement, payable directly to the association, and then transferred them to it; the trustees who accepted them having full knowledge of the con-

*See note at end of case.

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sideration for which they were given. *Held*, that the association stood in no better position than the trustee to whom they were given.

Assignments—Illegal Preferences.—Except as otherwise provided by statute as to conveyances by the debtor in fraud of his creditors, and as to unlawful preferences by him of one creditor over others, an assignee in a general assignment for the benefit of creditors stands in the shoes of his assignor, and what would be a defense against the latter will be a good defense against the former.

Estoppel.—*Held*, also, that upon the facts of this case the maker of the notes was not estopped to set up their illegality as a defense to a suit by the assignee of the association, or by receivers appointed by the court in place of the original assignee.

(Syllabus by the Court.)

APPEAL by defendant from Ramsey county district court. *Reversed*.

J. J. McCafferty, H. Weiss, and Samuel Morrison, for appellant.

Timothy D. Sheehan and Frederick N. Dickson, for respondents.

MITCHELL, J. The Minnesota Savings Bank of St. Paul was a savings association organized under Gen. Laws 1867, c. 23. William F. Bickel was its vice president, general manager, and one of its five trustees. On January 3, 1895.

Case Stated.

Bickel and the defendants entered into a written agreement whereby, in consideration of \$22,000 to be paid by the latter to the former, Bickel agreed "to assign, set over, transfer, sell, and deliver to the defendants an undivided one-half interest in and to the charter, franchises, business, good will, and profits of the Minnesota Savings Bank, and to effect and cause to be effected whatever proceedings and things should be necessary to be had and done to give and deliver to the defendants said full undivided half interest above described, and to place the organization of the board of trustees of said corporation in such condition as shall give effect to said agreement." The defendants, on their part, agreed "to nominate their proportion of said board of trustees"; and it was mutually agreed that "the nomination, election, and qualification thereof

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[defendants' proportion of the board of trustees] should constitute an acceptance and fulfillment of the contract" on part of Bickel. As the consideration for this contract, the defendants executed and delivered to Bickel their promissory notes for \$22,000. Instead of taking these notes payable to himself, Bickel caused them to be made payable to the order of the savings bank. He then turned them over to the bank, and on receipt of them the board of trustees transferred or surrendered to him certain assets of the bank (of the amount or value of which there is no evidence), which he has retained and appropriated to his own use. These notes, and notes given in renewal of some of them, were entered and carried on the books of the bank as part of its bills receivable up to and at the time the bank failed and closed its doors, on January 18, 1897. At a meeting of the board of trustees held a few days after the notes were executed, and on the next day after Bickel had turned them over to the bank, at the instance of Bickel two of their number resigned, and the two defendants were elected trustees in their places. The defendants accepted and qualified and acted as trustees, to the extent, at least, of occasionally attending the meetings of the board, until the bank failed. For seven or eight months in 1895 the defendant Kittson was on the pay roll of the bank as a salaried employee; his duties being, nominally, at least, to look after the real estate belonging to the bank. There was evidence tending to prove that the defendant Kittson knew that the notes were held by the bank as part of its assets, but there was no evidence that he knew that the bank had ever parted with anything of value for them. He never paid anything on them, but on one occasion gave a renewal note for one of them, and on another gave a note for accrued interest on the original notes. He never took any steps to rescind the agreement with Bickel, or to recover his notes, and, so far as appears, never repudiated his liability upon them, until this action was commenced. On January 18, 1897, the bank closed its doors, and executed to one William Bickel

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an assignment of all its assets for the benefit of its creditors. The assignee having resigned, the court appointed the plaintiffs receivers in his place; and they brought this action upon the notes, but Kittson alone was served with process, or appeared in the action. He interposed as defenses his incapacity to contract, by reason of drunkenness, false and fraudulent representations by Bickel and his co-defendant, Baker, and the want of any good or valid consideration for the notes. We find it unnecessary to consider any of these defenses, except the last. When the evidence closed, each party requested the court to direct a verdict in their or his favor, whereupon the court directed a verdict in favor of the plaintiffs, to which the defendant excepted, and, after verdict, moved the court for judgment notwithstanding the verdict, and, in case that was denied, for a new trial. The court refused to grant either, and thereupon the defendant appealed.

1. In view of the fact that a savings association organized under the act of 1867 has no capital stock, and that the nature of its business and the extent of its powers, as fixed by statute, are "to receive deposits and invest the same for the use, interest, and advantage of the depositors," and the further fact that neither the corporate franchise nor the office of trustee is assignable, it may admit of argument as to what, if any, right of property a trustee has in either the franchises or the assets of such an association, which he can assign. But assuming, as we shall, that there was a consideration for the notes, it was clearly an illegal one, on the ground that it was against public policy. While, on the face of the written agreement, Bickel agrees to assign and transfer to Kittson and Baker an undivided half interest in the bank, yet, upon reading the whole instrument, the sole and only means by which this was to be accomplished was by bringing about a change in the organization of the board of trustees. Hence, when reduced to its last analysis, the sole consideration for these notes was Bickel's agreement to secure the election of Kittson and Baker, or

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those whom they might designate, to the office of trustees of the bank. The agreement expressly provides that this should constitute a fulfillment of the contract on Bickel's part. This was clearly an illegal agreement. The office of trustee of an association of this kind is a fiduciary one, of the most sacred character. The incumbents

Savings Banks —
Trustees — Depositors.

of such an office are trustees for the depositors. Their fiduciary relation extends, not merely to the investment of deposits, but also and equally to the election of other trustees, who, with themselves, are to care for and look after the interests of depositors. It is a part of their trust duty to exercise this power of election, not for their own personal advantage, but for the best interests of depositors, and to see to it, as far as in them lies, to secure the highest attainable degree of integrity, ability, and fidelity for the management of the affairs of the association. No greater breach of trust can be conceived of than that of trustees of such associations selling or bartering the office of trustees for their own private gain, without regard to the interests of their *cestuis que trustent*, the depositors. And there could not well be any more flagrant example of this than is disclosed by the record in this case, when Bickel, for his own private gain,

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for Notes.

with the consent and assistance of his colleagues, secured the election to the office of trustee of a dissipated spendthrift of the age of 21 years, without either business ability or experience, and of another who must have been almost equally unfit for the position; for, from what appears in the record, he must have been either as devoid of business sense and judgment as Kittson, or else the fraudulent accomplice of Bickel to inveigle Kittson into this most foolish and improvident bargain. The contract between Bickel and the defendants was manifestly void on grounds of public policy, and the notes were equally void because given for an illegal consideration.

2. The bank stood in no better position than Bickel.

did not occupy the position of an innocent indorsee,

Note

for the notes were made payable directly to it. Moreover, the evidence discloses that the trustees knew all about the agreement between Bickel and the defendants, and what the consideration for the notes was, before they took them from Bickel. Knowing the facts, it is immaterial that they may not have understood the law applicable to those facts. The plaintiffs, as receivers, stood in the shoes of the original assignee; and an assignee for the benefit of creditors stands in no better position than his assignor, and what would be a defense against the latter will be a good defense against the former, except so far as his rights and powers are changed by statute. Our statute provides that, in general assignments for the benefit of creditors, the assignee represents the rights of creditors, as against all transfers of property by the debtor which would be held to be fraudulent or void as to creditors; and the insolvent act of 1881 gives an assignee or receiver the right to bring an action to avoid an unlawful preference of one creditor over another. Otherwise their rights and powers, so far as here material, are the same as at common law. There is nothing in the facts of this case to bring it within either of these statutory provisions. Neither is there anything in the facts upon which the doctrine of equitable estoppel can be successfully invoked. We have set out in our statement of facts everything which could have any possible bearing upon that subject. Order reversed, and cause remanded, with directions to the court below to render judgment in favor of the defendant notwithstanding the verdict.

Same—Knowledge
of Officers—Valid-
ity of Notes.

Assignments—
Illegal Prefer-
ences.

Estoppel.

NOTE.

Trustees of Savings Bank.—In *Hun v. Cary*, 82 N. Y. 65, 37 Am. Rep. 546, it was held that the relation existing between the savings bank and its trustees was that of principal and agent, while the relation between trustees and the depositors was similar to that of trustee and *cestui que trust*. See also *Savings Inst. v. Makin*, 23 Me. 360.

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M. V. MONARCH CO. *et al.*

v.

FARMERS' & DROVERS' BANK.

(*Court of Appeals of Kentucky, Jan. 26, 1899.*)

Corporation—Power to Become Surety.—With the exception of trust and guaranty companies, as a general rule, no corporation has the power to become a surety for another.

Notice of Protest*.—Where it appears that a party received a notice of protest in time, it is immaterial whether he received it through the mail or by personal delivery.

Bills—Legal Capacity of Maker—Indorsers.*—An indorser of a bill of exchange impliedly guarantees that it was made by a competent party.

APPEAL by defendants. *Reversed* as to appellant company.

Walker & Slack, Fairleigh & Straus, and Little & Little, for appellants.

Swecency, Ellis & Swecency, for appellee.

BURNAM, J. This action is upon a bill of exchange accepted by Slack & Perkins, drawn by the M. V. Monarch Company, and indorsed by M. V. Monarch and Mildred Perkins. Appellants, Slack & Perkins, the M. V. Monarch Company, and M. V. Monarch, filed a joint answer, in which joint and separate defenses are made. They jointly allege and plead that the obligation sued on contains usury, and ask that it be eliminated. The M. V. Monarch Company and M. V. Monarch allege that the Monarch Company is a private corporation, having the power to manufacture and sell whiskey and such other powers as are incident thereto; that it has no power to become the accommodation drawer or indorser upon the paper of any other person or corporation; that its name was signed as drawer to the bill of exchange

*Case Stated.

*See notes at end of case.

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sued on, as a mere accommodation for Slack & Perkins, who discounted the bill with plaintiff, and received the entire proceeds arising therefrom; that the signing of the name of the M. V. Monarch Company as drawer of the bill, and the indorsement of same by M. V. Monarch, were without consideration, and that this fact was known to the plaintiff at the time it discounted the original bill and at the time it accepted each bill in renewal thereof; that at the date of the maturity of the bill sued on the M. V. Monarch Company had its business office in the city of Owensboro, and that plaintiff and the notary public who protested the bill knew this fact; that M. V. Monarch had his office in Owensboro, but resided outside of the city limits; that the notary, at 6 o'clock p. m. on December 27, 1895, the date of the maturity of the paper sued on, placed a notice of protest in the post office at Owensboro, addressed to the M. V. Monarch Company, and also a notice addressed to M. V. Monarch, Owensboro, Ky.; that by reason of these notices having been deposited in the post office they were not received until some time during the next day, December 28, 1895, and that the notices could have been delivered to each of these defendants on the day of the maturity of the bill, at their respective offices; and these facts are pleaded by way of avoidance of the obligation sued on. Mildred Perkins, the last indorser, pleads in her answer that she was a mere accommodation indorser upon the bill; that the indorsement of the M. V. Monarch Company was *ultra vires*, and that they are not bound thereby; and by reason thereof she claims that, under the statute, she is released. A general demurrer was sustained to the answers of the M. V. Monarch Company, M. V. Monarch, and Mildred Perkins as to all the defenses relied on except that of usury; and, the defendants failing to plead further, a judgment was rendered against all the defendants for the debt sued on, after eliminating the usury it contained; and we are asked upon this appeal to reverse that judgment, on the ground that the court erred in sustaining the demurrer as to each defense relied on by defendants.

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We will consider these defenses *seriatim*. First, is the M. V. Monarch Company liable as an indorser under the allegations of the answer, which, upon demurrer, must be taken as true? As a general rule, a corporation has no power to enter into a contract of suretyship or guaranty, or otherwise lend its credit to another, unless such contract is reasonably necessary or is usual in the conduct of its business. Ordinarily, the simple act of becoming surety or guarantor for the contract or debt of another person or corporation is not within the implied powers of a corporation. The reason for this rule is that such a contract risks the capital and funds of the corporation in an enterprise not contemplated by the stockholders in subscribing for or purchasing its stock, prejudices the rights of its creditors, and exceeds the authority conferred by its charter. See 7 Am. & Eng. Enc. Law (2d Ed.) 778. The reason for this rule was well expressed in *Tod v. Land Co.*, 57 Fed. 51, where it is said: "First. The corporate funds belong to its shareholders, and, by the very terms of the law creating it, cannot be devoted to any other purposes than those indicated by its charter. Such obligations would violate the fundamental terms of the agreement between the incorporators themselves. Second. To do so would be to exercise a power not conferred by the state, either expressly or impliedly. The state's grant of the corporate franchise is for the purposes prescribed, and the execution of such obligations would be beyond the power conferred, and therefore a diversion of the corporate purposes as well as of the corporate funds." THOMPSON, in his *Commentaries on the law of Corporations* (section 5721), says: "With the exception of those corporations—such as trust and guaranty companies—which are organized for the express purpose of becoming sureties for other persons or corporations, and with other exceptions elsewhere stated, it may be laid down, as a general rule, that no corporation has the power, by any form of contract or indorsement, to become a guarantor or surety for, or

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otherwise lend its credit to, another person or corporation." And in section 5723, in assigning the reasons and limitations, he says: "This principle is designed for the preservation of the funds of the corporation, for the benefit of those having an interest in them, by preventing them from being embarked in enterprises not authorized by the charter or governing statute. Those persons are primarily the stockholders as long as the corporation continues a going concern, and it is their right that the corporate funds shall not be put to hazards or embarked in an undertaking not authorized by the contract of association. If the doctrine that the capital of the corporation is a trust fund, for the security of its creditors, is any more than an empty and idle collection of words, then the principle is also designed for the security of the creditors of the corporation, by preserving from an unauthorized dissipation a fund which, in the event of insolvency, equity impresses with a trust in their favor." There are, however, some exceptions to this general rule, and in a number of cases, where such contracts have been shown to be of manifest advantage to a corporation, they have been enforced. See 4 Am. & Eng. Enc. Law, 727-729; *Fuld v. Brewing Co.* (Com. Pl.) 18 N. Y. Supp. 456; and *Holmes v. Willard* (N. Y. App.) 25 N. E. 1083. But there is nothing in the allegations of the petition which brings the M. V. Monarch Company within the announced exceptions to the general rule, and the court erred in sustaining the demurrer to the plea of *ultra vires* relied on by the corporation.

The next question presented is, was M. V. Monarch entitled to a personal service of notice of protest, and, if so, did the failure of personal service release him, and was the notice given in due time? In *Neal v. Taylor*, 9 Bush, 384, in construing the third section of the act of January 16, 1864, prescribing the duties of notaries public in protesting negotiable paper in order to fix the liability of the parties thereto, this court said: "It was evidently intended by this enactment to alter the law merchant in regard to giving notice of the pro-

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test of commercial paper, but the act itself is so indefinite in its mandatory clause that judicial construction was made necessary in order to enable notaries to know what their legal duties were by reason of its provisions. The act required the notary, when he knows the place of residence of the parties to the bill, to give or send the notices to them, and not to the holder of the paper; but whether he is to deliver the notices in person or send them by mail or private hands on the day of the protest, or the next day, or in a reasonable time, is nowhere stated. The notary is left in entire ignorance as to the obligation it imposes. This court, in the opinion in *Todd v. Edwards*, 7 Bush, 93, was enabled, by the aid of the law merchant in connection with the act in question, to give it the only reasonable construction to which it was susceptible, and that was: 'Where parties to negotiable paper were entitled to notice in order to hold them liable, and lived in the same town or city where protest was made, there should be a notice in person delivered by the notary, or left at the dwelling or business house of the party sought to be charged. The law, in such case, requires that this notice should be delivered either on the day of dishonor of the paper or before the expiration of the business hours of the succeeding day.' " And in *Bondurant v. Everett*, 1 Metc. 658, this court held "that where the party sought to be charged as drawer or indorser of a bill lives near to, but not in or at, the place of dishonor, and the post office at that point is the office where he usually receives his letters or the nearest office to his residence, notice must be given to him by letter, through such office." There are numerous adjudications holding that the rule as to personal notice is to be restricted to cases where the party to be affected by the notice resides within the limits of the city or town in which the note is protested, and if he resides in the country, outside of those limits, but receives his mail at the post office at that town, a service by mail is sufficient. See *Ransom v. Mack*, 38 Am. Dec. 611. But it seems to be the settled rule

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that the holder of commercial paper is not required to give notice of dishonor on the day the paper is protested, but may give notice on the first business day thereafter, and such notice is sufficient. See 5 Am. & Eng. Enc. Law, (2d Ed.) 528, and 2 Daniel, Neg. Inst. 84. The answer of appellant shows that he received the notice of protest of this paper on the first business day after it was protested, and we do not think it is a matter of any importance whether he received it through the mail or by personal delivery directly from the hands of the notary. The fact that he got the notice in time is all that is required. In discussing this question, 2 Daniel, Neg. Inst. p. 56, says: "If the party receives the notice, the mere manner of its transmission is wholly immaterial. A personal service of notice is good wherever it may be made, provided it be done in proper time. At an improper place, it is sufficient if it reaches the party for whom it was intended in due season. And so, likewise, if it be sent by mail, where the parties reside in the same place, it is good if it duly reaches the party addressed. The distinction between the different modes of giving notice is this: Where the holder and indorser reside in different places, the former, if he deposits the notice in the post office in due season, has no further burden on him as to the actual receipt of it by the latter; but, where both parties live in the same town, the sender of the notice is bound to show that it was actually received by the indorser in due season." We think the law was fully complied with, so far as the notice is concerned.

The last question to be considered is that raised by the answer of Mildred Perkins; that is, can she escape liability on the paper because the act of the corporation in becoming a drawer of the bill was *ultra vires*? We think not. 2 Rand. Com. Pa-
 Bills—Legal Capacity of Maker—Indorsers.
 per, § 742, says: "The indorser, by placing his name on the back of a bill of exchange, note, or check, undertakes—First, that it shall be accepted and paid according to its tenor, on due present-

Notes

ment and notice of dishonor; second, that the instrument, and the signatures of all prior parties thereon, are genuine; third, that the parties to it are competent to contract; fourth, that the instrument is valid according to purport; fifth, that the indorser has the title and right to transfer. The indorsement of a bill when delivered, implies a warranty or promise that it shall be paid on condition of due presentment and notice of dishonor. If the bill is payable in future, he undertakes that he will pay it with damages, if the drawee fails on presentment, and he is duly notified of such failure." Generally, an indorser of a negotiable instrument warrants to a *bona fide* holder the existence of every essential necessary to constitute the instrument a valid and subsisting obligation. It is a part of the contract of indorsement that the paper indorsed has been made by a person competent to contract in that form. See *Archer v. Shea*, 14 Hun, 493; *Kenworthy v. Sawyer*, 125 Mass. 28; *Ross v. Dixie*, 7 U. C. Q. B. 414. It seems clear, from the authorities on this question, that the liability of appellant Mildred Perkins is not affected by the failure of the M. V. Monarch Company to become liable upon its indorsement. For the reasons indicated herein the judgment is reversed upon the appeal of the M. V. Monarch Company, and affirmed as to the other appellants, and the cause is remanded for proceedings consistent with this opinion.

NOTES.

Notice of Dishonor—Service.—The fact that a notice of dishonor was mailed to one dwelling in the same town is immaterial if the notice was in fact received in due time. *Hyslop v. Jones*, 3 McLean (U. S.) 96; *Hill v. Norvell*, 3 McLean (U. S.) 583; *Spalding v. Krutz*, 1 Dill. (U. S.) 414; *Foster v. McDonald*, 5 Ala. 376; *Grinman v. Walker*, 9 Iowa 426; *Cornett v. Hafer*, 43 Kan. 60; *Cabot Bank v. Warner*, 10 Allen (Mass.) 522.

Warrant of Indorser as to Capacity of Antecedent Parties.—It is a part of the contract of indorsement, that the paper indorsed has been made by a person competent to contract in that form. *Archer v. Shea*, 14 Hun (N. Y.) 493; *Kenworthy v. Sawyer*, 125 Mass. 28; *Erwin v. Downs*, 15 N. Y. 575.

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Illustrations.—Although a note given by a wife to her husband is void, yet if it be indorsed over by the husband as between him and the indorsee, it is good. *Haly v. Lane*, 2 Atk. 181; *Robertson v. Allen*, 3 Baxt. (Tenn.) 233.

The indorser of a bill is estopped by the fact of his indorsement from denying either the signature of the drawer or her competence (being a *feme covert*) to draw the bill. *Ross v. Dixie*, 7 U. C. Q. B. 414.

A second indorser cannot, in an action against him on the bill, dispute the legal capacity of the payee to indorse on the ground that she was a married woman. *Prescott Bank v. Caverly*, 7 Gray (Mass.) 217, 66 Am. Dec. 473; *Ogden v. Blydenburgh*, 1 Hilt. (N. Y.) 182.

In *Haly v. Lane*, 2 Atk. 181, *HARDWICKE*, L. C., says: "In cases of like nature I have, at the sittings of *nisi prius*, directed a jury to find for an indorsee, notwithstanding the indorser had the note from an infant, the original drawer."

One who indorses a promissory note purporting to be executed by a copartnership, thereby impliedly contracts that the note was made by the firm in whose name it is executed, and he cannot dispute the fact in an action upon his indorsement. *Dalrymple v. Hillenbrand*, 62 N. Y. 5, 20 Am. Rep. 438, *affirming* 2 Hun (N. Y.) 488.

MONARCH *et al.*

v.

FARMERS' & TRADERS' BANK.

(Court of Appeals of Kentucky, Jan. 26, 1899.)

Bills—Notice of Protest.*—Where the drawer and acceptor of a bill of exchange reside outside the corporate limits of the city which is the place of the dishonor of the bill, although within the post-office delivery within which the holder and notary reside, notice of protest may be sent through the post-office.

APPEAL by defendants from Daviess county circuit court. *Affirmed*.

Walker & Slack, Fairleigh & Straus and Little & Little, for appellants.

Sweeney, Ellis & Sweeney, for appellee.

BURNAM, J. This action is upon a bill of exchange accepted by R. W. Slack, drawn by M. V. Monarch,

*See notes at end of case.

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and indorsed by R. Monarch. Appellants M. V. and R. Monarch filed a joint answer, to which demurrer was sustained, and judgment was rendered against them. Upon this appeal we are asked to reverse that judgment, on the ground of insufficiency of notice of protest. Appellants each reside outside the corporate limits of the city of Owensboro, which was the place of the dishonor of the bill, and within the same post-office delivery within which the holder and notary reside. It is insisted that the notice of dishonor was insufficient solely because it was sent through the post-office, and was not delivered to them personally, or left at their respective residences. The defense relied on in this case has been carefully considered in the opinion this day rendered in the case of *M. V. Monarch Co. v. Farmers' & Drovers' Bank*, 49 S. W. 317; and, for the reasons indicated in that opinion, the judgment appealed from in this action is affirmed.

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Bills and Notes—Protest—How Notice May Be Given.—Where the person to be notified resides in a different town or village from that in which the party giving notice of protest resides, such notice may be sent by mail. *Bussard v. Levering*, 6 Wheat. (U. S.) 102; *Lindenberger v. Beall*, 6 Wheat. (U. S.) 104; *Greene v. Farley*, 20 Ala. 322; *Shepard v. Hall*, 1 Conn. 329; *Munn v. Baldwin*, 6 Mass. 316; *Shaylor v. Mix*, 4 Allen (Mass.) 351; *State Bank v. Ayers*, 7 N. J. L. 130; *Foster v. Sineath*, 2 Rich. L. (S. Car.) 338; *Peabody Ins. Co. v. Wilson*, 29 W. Va. 528. Compare *Nashville Bank v. Bennett*, 1 Yerg. (Tenn.) 166.

Where Person to Be Charged Resides at Place of Protest.—Where the party giving notice is the last indorsee, and the party to be charged resides at the place of dishonor, the notice must be personal. Thus where a note was payable at a particular place, and the party to be charged resided at the place of payment, it was held that notice given through the post-office at that place by a notary was insufficient although the actual holder resided in a different place. *Bowling v. Harrison*, 6 How. (U. S.) 248.

Contra.—But a different rule has been laid down in Alabama. *Gindrat v. Mechanics' Bank*, 7 Ala. 324; *Bibb v. McQueen*, 42 Ala. 408; *Philipe v. Harberlee*, 45 Ala. 597.

Where Party to be Charged Does Not Reside at Place of Protest.—But where the party to be charged resides in a different place from that in which the transaction which is to be notified takes place, personal service of a notice of dishonor is not required to be made

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although the party to be charged and the party who is to serve the notice, if he be the last holder, reside in the same place. *Ransom v. Mack*, 2 Hill (N. Y.) 590, 38 Am. Dec. 602; *Eagle Bank v. Hathaway*, 5 Met. (Mass.) 212.

Thus notice of protest may be given through the mail by a notary at the place of dishonor to a drawer or indorser living in a different place, and this though the actual holder and the party to be charged reside in the same place. *Greene v. Farley*, 20 Ala. 322; *Hartford Bank v. Stedman*, 3 Conn. 489; *Manchester Bank v. Fellows*, 28 N. H. 313. See also *Wynen v. Schappert*, 6 Daly (N. Y.) 558.

Where Party to Be Charged Resides at Great Distance from Post-Office.—An exception to the rule as stated above has been held to be necessary also where the party to be charged resides at an unreasonably great distance from any post-office. *Fish v. Jackman*, 19 Me. 467, 36 Am. Dec. 769. See also *Columbia Bank v. Lawrence*, 1 Pet. (U. S.) 578.

But in *State Bank v. Ayers*, 7 N. J. L. 130, FORD, J., said: "If persons residing far from a post town, aside from the common walks of gregarious commerce, will give their names in guarantee of commercial paper, it is better they should be held to inquire for letters at the nearest post-office, about the time such paper comes to maturity, than that the holder should be compelled to send a special messenger fifty or one hundred and fifty miles to serve personal notice; or that an established system of notices, sufficiently complex already, should be forced to give way to the introduction of novel exceptions imposing burthensome, expensive, and hazardous duties on all men of business, merely out of favor to eccentric residences."

When Mail Service is Suspended.—Where the mail service between two points is suspended, service of notice should be made by some other mode of conveyance. *Citizens' Bank v. Pugh*, 19 La. Ann. 43; *Lapeyre v. Robertson*, 20 La. Ann. 399.

Proper Transmission—Question for Court.—Whether in a given case notice sent through the post-office is sent by the proper modes is a question of law when the facts are ascertained and undisputed. *Columbia Bank v. Lawrence*, 1 Pet. (U. S.) 582.

When Parties Reside in Different Villages of Same Municipality.—Notice by mail will be sufficient where the parties reside in the same municipality, town, or district, but in distinct parishes, villages, or settlements, distant from each other, between which there is a regular intercourse by mail, where it is shown that the party to be charged is in the habit of receiving letters at the post-office of a village or settlement in or near which he resides. *Shaylor v. Mix*, 4 Allen (Mass.) 351; *Ransom v. Mack*, 2 Hill (N. Y.) 587, 38 Am. Dec. 602; *Paton v. Lent*, 4 Duer (N. Y.) 231; *Van Veechten v. Pruyn*, 13 N. Y. 549. See also *Chicopee Bank v. Eager*, 9 Met. (Mass.) 583.

Notices between Distant Post-Offices in Same City.—In *Paton v. Lent*, 4 Duer (N. Y.) 231, it was held to be a sufficient notice to an indorser, though residing in the city where the note was protested, to mail it to him when he resides some eight miles from the place where it was protested and there is a post-office at the place where he resides, no point being made that he does not receive his letters at such post-office.

In *Shaylor v. Mix*, 4 Allen (Mass.) 351, BIGELOW, C. J., said: "On

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the question of notice, the fact that the parties both live within the territorial limits of a large town and under the same municipal government may be quite immaterial. The real inquiry is whether there are regular communications by mail from the place where the notice is deposited to that where the drawer or indorser resides, and a separate post-office in the latter place to which he is in the habit of resorting to receive letters which are forwarded to him there by mail. If so, then a notice seasonably deposited in the mail may well be deemed a reasonable and sufficient notice of the dishonor of a bill or note."

Where Party Resides Outside City Limits, but Receives Mail Therein.—Where the party to be notified resides outside the town or city in which the holder resides or the paper is payable, but is in the habit of receiving his mail at the post-office there, although he has no place of business therein, the general doctrine is that it is sufficient to deposit a notice addressed to him in such post-office. *Columbia Bank v. Lawrence*, 1 Pet. (U. S.) 578; *Carson v. State Bank*, 4 Ala. 148; *Walker v. Augusta Bank*, 3 Ga. 486; *Timms v. Delisle*, 5 Blackf. (Ind.) 447; *Bell v. State Bank*, 7 Blackf. (Ind.) 456; *Bondurant v. Everett*, 1 Metc. (Ky.) 658, *overruling* *Farmers'*, etc., *Bank v. Butler*, 3 Litt. (Ky.) 498; *Lathrop v. Delee*, 8 La. Ann. 170; *New Orleans Canal, etc., Co. v. Barrow*, 2 La. Ann. 326, apparently *overruling* *M'Crummen v. M'Crummen*, 5 Martin N. S. (La.) 158, and *State Bank v. Rowel*, 6 Martin N. S. (La.) 506; *U. S. Bank v. Norwood*, 1 Har. & J. (Md.) 423; *Barret v. Evans*, 28 Mo. 331; *Sanderson v. Reinstadler*, 31 Mo. 483; *State Bank v. Vaughan*, 36 Mo. 90; *Jones v. Lewis*, 8 W. & S. (Pa.) 14; *Foster v. Sineath*, 2 Rich. L. (S. Car.) 338. See also *Nevius v. Lansingburg Bank*, 10 Mich. 547, *overruling* *Newberry v. Trowbridge*, 4 Mich. 391.

Contra.—*Patric v. Beazley*, 6 How. (Miss.) 609, 38 Am. Dec. 456; *Forbes v. Omaha Nat. Bank*, 10 Neb. 344, 35 Am. Rep. 480; *Barker v. Hall, Mart. & Y. (Tenn.)* 183; *Brown v. Abingdon Bank*, 85 Va. 95. See also *Davis v. State Bank*, 4 Sneed (Tenn.) 390.

Where Notice Actually Received.—In *Nebraska*, however, it has been held that where an indorser receives his mail at the place where the note is payable, a notice of nonpayment actually received by him through the mail in due time will be sufficient to charge him as indorser. *Phelps v. Stocking*, 21 Neb. 443; *Hendershot v. State Nat. Bank*, 25 Neb. 127.

Where Party to Be Notified Has Place of Business Within City Limits.—Where an indorser lives outside of the limits of the city at which the note is payable and dishonored, it has been held that notice through the post-office to such an indorser is ordinarily sufficient; but if in such a case the indorser has a known place of business in the city, notice of protest should be left there, and cannot be given through the post-office unless it is shown to have been received in due time. *Spalding v. Krutz*, 1 Dill. (U. S.) 414.

Where Party Receives Mail in One Town and Resides in Another Post Town.—In *Shelburne Falls Nat. Bank v. Townsley*, 107 Mass. 444, it was held that an indorser living in a post town is not properly notified by a drop letter left for him in the post-office in another town, where the holder resides, and addressed to the indorser as if he also resided there, even though it should appear that the indorser is in the habit of resorting to the post-office in each of the two places.

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RUDD *et al.*

v.

DEPOSIT BANK.

RUDD

v.

SAME.

(Court of Appeals of Kentucky, Jan. 26, 1899.)

Judgments against Agents.—Where defendant in an action on a bill of exchange signed by defendant as agent for an estate was sued as such agent, execution on the judgment recovered will go to be levied of assets in his hands as agent, and not of his individual property.

Action on Bill—Pleading.—A petition, in an action against S. & M., which alleges that S., as agent of a certain estate, accepted in writing, and promised to pay the bill sued on, and that before maturity thereof it was sold, discounted and indorsed to plaintiff by M. in the usual course of business, sufficiently avers an agreement or promise to pay on the part of defendants.

Same—Same.—The question whether the petition states a cause of action cannot be raised by general demurrer.

Same—Same.—In such action, where the petition amended at defendant's instance furnished sufficient information to enable them to ascertain definitely the amount of usury involved, an answer to such amended petition which merely states that defendants cannot form a belief whether such information is true or not, is demurrable.

Notice of Protest.*—A notice of protest of a bill is sufficient if, on the whole, it so designates or distinguishes the paper as to leave no reasonable doubt in the mind of the party notified as to the paper intended.

APPEALS by defendants from Daviess county circuit court. *Affirmed.*

Walker & Slack and Chapeze Wathen, for appellants.

Sweeney, Ellis & Sweeney and Weir & Weir, for appellee.

*See notes at end of case.

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BURNAM, J. These two appeals involve the determination of the same points. They are free from judgments rendered in suits instituted by appellee to recover of William Rudd, as drawer, John
Case Stated. Murphy, as indorser, and R. W. Slack, agent for the Rudd estate, as acceptor, certain bills of exchange, which had been protested for nonpayment. The same defenses were made in both suits by R. W. Slack, as agent for the Rudd estate, and John Murphy. Slack, as agent for the Rudd estate, answers as acceptor, and says that, before he qualified as agent for that estate, the drawer, William Rudd, was acting in that capacity, and was the acceptor of the bills when originally created; that when he qualified as agent he simply renewed the bills theretofore carried by plaintiff with his predecessor as agent; that each of them evidenced the same debt, and that each was for the use and benefit of the Rudd estate; that there was usury embraced in all of them, and that the amount therein was known with absolute certainty to plaintiff, but that he had no knowledge or information as to how much, and he asked that plaintiff be required to state specifically when each of the bills originated, the dates when they were renewed, and the amount of interest paid at the date of each renewal, and that the usury embraced therein be eliminated. Thereupon plaintiff filed its amended petition, setting out fully the history of the bills and the usury contained in each, which was sworn to by the president of the bank. Slack, as agent, filed answer to the amended petition, in which he pleads lack of knowledge or information sufficient to form a belief as to whether the history given by the bank of the bills and the usury contained therein are correct, and averred that he believed that there was more usury in the bills than was admitted by plaintiff, but that he could not state how much. Plaintiff demurred to the answer as amended, which was sustained, and judgment was rendered against Slack, as agent of the Rudd estate. The defendant John Murphy filed a general demurrer to the petition, and he also filed an answer,

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in which he denies that he promised to pay either of the bills sued on, but alleges that he was a mere accommodation indorser thereon; that he did not know, or have information sufficient to form a belief, as to whether plaintiff presented the bills at maturity at the place where they were made payable, or demanded payment, or that payment was refused, or that the bills were, in fact, protested for nonpayment, except as furnished by the protest filed with the petition, and files as an exhibit with his answer the various notices received by him from the notary public, of which the following is a specimen: "Daviess County, City of Owensboro, February 6, 1896. Please take notice that a bill of exchange for \$1,000.00, drawn by W. M. Rudd on R. W. Slack, agent of the Rudd estate, in favor of John Murphy, or order, dated December 5, 1895, payable 60 days after date, at Owensboro, Ky., indorsed by John Murphy, was this day protested by the undersigned notary public for nonpayment. The holder thereof looks to you for payment. To John Murphy. Gus T. Brannon, Notary Public." The notice of protest on each of the bills is alike. The plaintiff filed demurrers to these answers as amended, which were sustained; and, the defendants declining to plead further, it was adjudged by the court "that the Deposit Bank of Owensboro, Ky., recover of the defendants Wm. Rudd, John Murphy, and R. W. Slack, agent of the Rudd estate, the amount of each acceptance, with interest; * * *" and we are asked upon this appeal to reverse that judgment for a number of alleged errors:

First, because the judgment as rendered is against R. W. Slack, to the payment of which his individual property may be subjected, and not against the Rudd estate, the real debtor. In response to this it may be said that the bill of exchange sued on was accepted by R. W. Slack as agent of the Rudd estate; that the suit was against him in the same capacity; and that the whole proceeding shows that it is not a claim for which R. W. Slack or his estate is personally liable, but one against the Rudd

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estate; and, if execution should issue on the judgment, it would go to be levied of assets in his hands as agent.

It is the next contention of appellants that the petition in neither case sufficiently avers an agreement or promise to pay. The petition alleges that R. W. Slack, as agent of the Rudd estate, accepted in writing, and promised and agreed to pay, the bill in question, and that before the maturity thereof it was sold, discounted, and indorsed to the plaintiff by John Murphy, in the usual course of business. It avers an express promise to pay by Slack, and the allegation "that it was sold, discounted, and indorsed to the plaintiff by Murphy" amounts to an averment that he signed and delivered the bill.

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Pleading.

The third ground relied on is that the petition does not state facts sufficient to support a cause of action, and that it fails to refer to the act of plaintiff's incorporation, as required by subsection 2 of section 119 of the Civil Code of Practice. This defense is not made or relied on in the answer of either of the defendants, and the question cannot be raised by general demurrer.

Same—Same.

It is also insisted by appellants that the court erred in sustaining a demurrer to their answers to plaintiff's amended petition. We cannot concur in this contention. By their original answer, the appellants allege that the plaintiff had exact information as to the amount of usury contained in the obligation sued on, and asked that it be required to state the time when the bills originated, the date of each renewal, and the amount of interest paid thereon. The amended petition furnished specifically the information called for, and the defendants cannot be permitted to say that they have not sufficient knowledge or information to form a belief as to whether the information given is true or not. If the defendants desired to challenge the correctness of the bank's statement as to the history of the obligations sued on, or as to the amount of usury contained therein, they

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should do so specifically, as the amended petition furnished sufficient information to enable them to ascertain definitely the amount of such usury. The demurrer was properly sustained.

The last ground of complaint relied on by appellant Murphy is that the notice of protest was not sufficiently definite to identify the note protested. It is not necessary for a notice to give all the essential parts of the paper dishonored, or to describe it in every respect accurately. The rule, stated generally, may be said to be that "a notice is sufficient if, on the whole, it so designates or distinguishes the paper as to leave no reasonable doubt in the mind of the party notified what paper was intended." See 4 Am. & Eng. Enc. Law, 417, and authorities there cited. The requirements of the law are considered as satisfied by any description which, under all the circumstances of the case, so designates the bill or note as to leave no doubt in the mind of the party, as a reasonable man, what bill or note was intended. See Daniel, Neg. Inst. § 974. Chit. Bills, 290, says: "There are two requisites to a good notice, *viz.* a description of the bill, and an intimation that it has been dishonored." In Mills v. Bank, 11 Wheat. 437, the court says: "The objection to the notice is that it does not state that payment was demanded at the bank when the note became due. It is not necessary that the notice should contain such a formal allegation. It is sufficient that it states the nonpayment of the note, and that the holder looks to the indorser for indemnity." In the case of Young v. Bennett, 7 Bush, 478, this court said: "It is not required that the notice of the dishonor of a bill should be set out in any particular form, nor is the party giving it confined to specific language." It seems to us that the protest and notice of dishonor in each case is a substantial compliance with the requirements of the law. For the reasons indicated, the judgments in both cases are affirmed.

Notice of Protest.

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Bills and Notes—Notice of Protest—Description of Paper.—A notice of protest will not be rendered insufficient by an omission or misdescription in the paper in question, if on the whole it so designates or so distinguishes the paper as to leave no reasonable doubt in the mind of the party notified which paper was intended. *Cooper v. Gibbs*, 4 McLean (U. S.) 396; *Crawford v. Branch of State Bank*, 7 Ala. 205; *Kilgore v. Bulkley*, 14 Conn. 363; *Brown v. Jones*, 125 Ind. 375, 21 Am. St. Rep. 227; *Wood v. Watson*, 53 Me. 300; *Gilbert v. Dennis*, 3 Met. (Mass.) 495, 38 Am. Dec. 329; *Townsend v. Chas. H. Heer Dry Goods Co.*, 85 Mo. 508; *Howland v. Adrain*, 30 N. J. L. 41; *Dodson v. Taylor*, 56 N. J. L. 11.

In *Mills v. U. S. Bank*, 11 Wheat. (U. S.) 431, MR. JUSTICE STORY said: "It cannot be for a moment maintained that every variance, however immaterial, is fatal to the notice. It must be such a variance as conveys no sufficient knowledge to the party of the particular note which has been dishonored. If it does not mislead him, if it conveys to him the real fact without any doubt, the variance cannot be material, either to guard his rights or avoid his responsibility."

In *Thompson v. Williams*, 14 Cal. 160, the court said: "The object of the law in requiring a correct description of the note to be given in the notice to the indorser is that he may be put upon notice of the extent of his liability, and placed in possession of the material facts necessary to enable him to secure the liability of others over to him, and his own reimbursement upon payment of the note. The rule was not intended to subserve a technical purpose, but to promote substantial justice, and when it sufficiently appears that the indorser at the time of receiving the notice knew what particular piece of paper was referred to, and could not have been prejudiced by the failure to describe it, he cannot be permitted to object that his information was not communicated in a particular manner."

Illustrations.—In the following cases the above rule was held to be applicable, and the misdescription or omission declared immaterial:

Note Described as a Bill.—*Messenger v. Southey*, 1 M. & G. 76, 39 E. C. L. 360.

Bill Described as a Note.—*Stockman v. Parr*, 11 M. & W. 809.

Misdescription as to Date.—*Mills v. U. S. Bank*, 11 Wheat. (U. S.) 431; *Ross v. Planters' Bank*, 5 Humph. (Tenn.) 335.

Omission of Date.—*Shelton v. Braithwaite*, 7 M. & W. 436; *Saltmarsh v. Tuthill*, 13 Ala. 390; *Housatonic Bank v. Laffin*, 5 Cush. (Mass.) 546; *Youngs v. Lee*, 12 N. Y. 551.

Abbreviated Statement of Date.—Where a draft was referred to in a notice as dated 2—11—84, it was held that the omission of the name of the month was immaterial. *Brown v. Jones*, 125 Ind. 375, 21 Am. St. Rep. 227. The court in this case said: "The appellant knew as well from the figures employed the dates intended as though the name of the month had been written, and that was all that was necessary."

Mistake or Omission as to Time of Payment.—*Shelton v. Braithwaite*, 7 M. & W. 436; *Saltmarsh v. Tuthill*, 13 Ala. 390; *Denegre v. Hiriart*, 6 La. Ann. 100; *Youngs v. Lee*, 12 N. Y. 551; *Gates v. Beecher*, 60 N. Y. 518, 19 Am. Rep. 207; *Tobey v. Lennig*, 14 Pa. St. 483.

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Where notice was served on the indorser on the 25th of May setting forth that a note indorsed by him was due on that day, which was the day on which the note in suit actually fell due, but the notice was dated May 26, the notice was held to be sufficient though there was a misdescription of the note as to the time of payment. *Tobey v. Lennig*, 14 Pa. St. 483.

Misdescription as to Place of Payment.—*Housatonic Bank v. Laflin*, 5 Cush. (Mass.) 546.

In an action by the indorsee against the indorser of a bill of exchange payable at the London Joint Stock Bank in London, notice of dishonor was proved describing the bill as payable at the London and Westminster Bank. This was held to be no ground for nonsuit, the notice being accurate in all other respects and there being no proof that the defendant has been misled. *Bromage v. Vaughan*, 9 Q. B. 608, 58 E. C. L. 608.

Mistake or Omission as to Amount.—*Shelton v. Braithwaite*, 7 M. & W. 436; *Alexandria Bank v. Swann*, 9 Pet. (U. S.) 33; *King v. Hurley*, 85 Me. 525; *Snow v. Perkins*, 2 Mich. 238; *Rowan v. Odenheimer*, 5 Smed. & M. (Miss.) 44; *Cayuga County Bank v. Warden*, 1 N. Y. 413; *Compare Remer v. Downer*, 23 Wend. (N. Y.) 620.

Thus a notice of protest of a note, which described the note protested as being of one dollar less in amount than the one offered in evidence, but in other particulars identified it, is sufficient to uphold the finding of the jury against the indorser predicated on such notice. *Rowan v. Odenheimer*, 5 Smed. & M. (Miss.) 44.

In the same way where a notice misdescribed a note in respect to the sum for which it was made, as where the note was for six hundred dollars and the notice described a note for three hundred dollars, it was held that the notice was sufficient where it was shown, in aid of the defect, that there was no other note in existence to which the description contained in the notice could be applied. *Cayuga County Bank v. Warden*, 1 N. Y. 413.

Omission of Name of Indorser.—*King v. Hurley*, 85 Me. 525; *Sasser v. Farmers' Bank*, 4 Md. 409.

Indorser Described as Maker.—*Haines v. Dubois*, 30 N. J. L. 261.

Drawer Described as Acceptor.—*Mellersh v. Rippen*, 7 Exch. 579; *Compare Beauchamp v. Cash*, D. & R. N. P. 3, 16 E. C. L. 410; *Gill v. Palmer*, 29 Conn. 54.

Omission of Name of Drawee.—*Mainer v. Spurlock*, 9 Rob. (La.) 161.

Misdescription of Payee.—Where the payee of a bill was described as George N. Reid instead of George W. Ried it was held that the mistake was immaterial, as it was not calculated to deceive. *Ried v. Ried*, 11 Tex. 585.

Where There are Two Instruments to Which Description may Apply.—In *Hodges v. Schuler*, 22 N. Y. 114, WRIGHT, J., said: "Secondly, as to the objection founded on an omission in the notice to designate the number of the note sued on: it seems that the note was designated in its margin as No. 253, and the notice omitted to describe it by the number; but this did not render the notice *per se* fatally defective. The number was not a part of the note, and there was a complete description of it without the number. * * * All that a holder of a note is bound to do is to give the indorser a complete description of it, and if from such description it cannot be identified, it is the fault or misfortune of the indorser in having indorsed several

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notes alike in every essential feature." In this case there was an inaccurate description as to the name of the maker which was held not to be in itself misleading.

Description not Reasonably Applicable to Other Paper.—Davenport v. Gilbert, 4 Bosw. (N. Y.) 532; Cooperstown Bank v. Woods, 28 N. Y. 545.

A notice of protest dated on the day a note matured, describing it by the name of the maker and its amount, and as indorsed by the defendant, and stating that such note was protested for nonpayment, was held to be sufficient in form without stating further descriptive particulars, although the defendant was, at the time of receiving such notice, the indorser of another note in all respects like it, which was outstanding and unpaid, except that it was payable three instead of six months after its date, it being shown that a suit was pending on the note first due when the second note was protested, and that the defendant had answered in such suit before the note in question matured. Davenport v. Gilbert, 4 Bosw. (N. Y.) 532.

Also where several notes were indorsed by a party, the notice was held to be sufficiently descriptive of one of the notes where it used the present tense, saying the note "is protested" (apparently referring to the day of the date of the notice as the day when it was protested), and described the amount of the note and the name of the maker, and was addressed to the indorser, and where, moreover, none of the other notes were held by the party sending the notice, and none of them were in fact protested, and no other note of similar kind fell due at the date of notice. Cooperstown Bank v. Woods, 28 N. Y. 545.

A person indorsed four notes which were alike in every particular excepting in regard to the time of payment, and all of which were held by a single party. Notice was given which was sufficiently descriptive of the first note falling due. Afterwards a second notice was given, which was applicable to either the first or second note falling due, it being an exact copy of the first notice with the exception of a specification as to interest due, and the date, which was the same as that on which the second note became due. It was held that the second notice was insufficient in that it did not state the time of payment, the circumstance which distinguished the several notes. Cook v. Litchfield, 9 N. Y. 279.

However, in a new trial in the lower court, it was held that the notice was sufficient, it being shown by extrinsic evidence that, as a matter of fact, the indorser had not been misled by the notice. Cook v. Litchfield, 9 N. Y. 291.

Misdescription of Maker.—Where there is a misdescription in the name of the maker of a note, as where he is described as "Jotham Cushing" instead of "Jotham Cushman," the error has been held to be trifling and immaterial where it is shown that there was only one note to which the description could apply. Smith v. Whiting, 12 Mass. 6, 7 Am. Dec. 25.

Also where a note was described to have been made by "S. Henshaw, treasurer," when in fact it was made by a railroad company, as whose agent S. Henshaw, in his capacity as treasurer, signed the note, along with the president, the notice was held not to be fatally defective where it correctly described the note in every other particular, and where, as a matter of fact, it did not mislead the party notified as to the paper indorsed. Hodges v. Shuler, 22 N. Y. 114.

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Also where notice given to the defendant was of the nonpayment of a note signed by John B. Roddy, etc., describing the note correctly as to other circumstances except the signature of John instead of James, the court said that if the jury should be of opinion from the evidence that the defendant had good reason to believe it to be the note in the declaration mentioned, the jury ought to presume that the defendant had reasonable notice, etc. *Underwood v. Huddleston*, 2 Cranch (C. C.), 93.

Illegibility of Maker's Name.—Where the maker's name in a note is illegible, and the holder fails to make reasonable effort to ascertain the name, and misdescribes it in the notice, whereby an indorser is misled, the defect will render the notice insufficient. *McGeorge v. Chapman*, 45 N. J. L. 395, *BEASLEY, C. J.*, in this case said: "If the signature had been so written as to lead the notary, in the exercise of due caution and skill, to the belief that it stood for a certain name, and he had so described it, such error would not have vitiated his notice. A mistake of that character is not attributable to the negligence of the holder of the paper or that of his agent giving notice of its dishonor, but the indorser who passes the paper into circulation must bear the consequences of such misleading defect. But when the name of the maker is not so fashioned as to suggest to the notary a false name, but he finds it illegible, then it plainly becomes his duty to use reasonable endeavors to ascertain who is the person thus indistinctly signified. He is, when thus placed, put upon inquiry, and must use proper diligence."

Omission of Name of Maker—New York Doctrine.—In *Home Ins. Co. v. Green*, 19 N. Y. 518, 75 Am. Dec. 361, it was held that a notice of nonpayment of a promissory note was not sufficiently certain to charge the indorser where it did not state the maker's name. *DENIO, J.*, in this case said: "The most descriptive feature of a note is the name of the maker. The date, amount, and time of the payment, and the statement that the party served with the notice was an indorser, might or might not recall it to his recollection. One indorsing frequently for the accommodation of different persons, and keeping no bill-book, would not, by means of such a notice, ordinarily be able to identify the paper on which he was sought to be charged. Nor would one who indorsed and negotiated his own business paper, if his transactions of that kind were extensive, be much more likely to know what particular paper had been dishonored."

Omission of Maker's Name—New Jersey.—In *Howland v. Adrain*, 30 N. J. L. 41, the court said: "This case is distinguishable from that of the *Home Ins. Co. v. Green*, 19 N. Y. 518, 75 Am. Dec. 361, on the ground that the proof showed that defendant knew what note was intended, with reasonable certainty. Indeed, that case seems hardly reconcilable with the current of authorities, or even with the cases cited by the court in its support. Perhaps it may be supported upon the ground that a mistake in the name, or the omission of it altogether, should be held fatal, inasmuch as the object of the notice is to enable the indorser to look after the maker immediately and secure himself."

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NEAL *et al.*

v.

COBURN.

(Supreme Judicial Court of Maine, Nov. 25, 1898.)

Banks—Signature of Depositor—Presumption of Knowledge.*—A bank is presumed to know the signatures of its depositors.

Forged Checks—Payment by Mistake.*—If a bank pay to an innocent holder for value the amount of a check purporting to be drawn upon it by one of its depositors, but the signature to which was in fact forged, the bank cannot recover back the amount from such holder.

Same—Liability of Prior Holder.—If such a holder, on demand, repay the amount to the bank, that does not entitle him to recover the amount from a prior innocent holder for value, who had indorsed the check.

(Official.)

AGREED statement from Franklin county supreme judicial court. *Nonsuit.*

The argued statement of facts reads as follows: "For the purposes of this trial it is agreed that the check declared on in plaintiffs' writ, purporting to have been drawn by H. C. Haven, in favor of J. W. Crew, on the Bay State Trust Company, dated June 19, 1895, for two hundred and fifty dollars (\$250), is a forgery; that the defendant received said check from said Crew on the 5th or 6th of July, 1895; that said Crew was a stranger in the vicinity, boarding at the hotel of the defendant, and gave this check in payment of his board bill, which amounted to ninety-nine dollars and seventy-five cents (\$99.75), receiving from the defendant the balance, amounting to one hundred fifty dollars and twenty-five cents in money; that said Crew is not known or believed by the parties to have ever owned any property in this state, which was attachable;

*See notes at end of case.

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that defendant has never seen or heard from said Crew since taking the said check from him, as aforesaid, and does not know or believe that his real name is Crew, but believes he was an impostor; that said Crew left immediately upon paying his board bill as aforesaid; that defendant indorsed said check, and delivered the same to the plaintiff on July 20, 1895, paying an account which plaintiffs had against him of about fifty dollars (\$50), receiving the balance in money; that plaintiffs indorsed and delivered said check to Furbish, Butler & Oakes, on July 22, 1895; that Furbish, Butler & Oakes indorsed and deposited said check to their credit for collection, in the Phillips National Bank, on July 23, 1895; that the Phillips National Bank indorsed the same, and forwarded it for collection to their correspondent in Boston, the National Bank of the Commonwealth, where it was received on the 26th day of July, 1895; that, on the same day, it was presented through the clearing house and Merchants' National Bank, by the National Bank of the Commonwealth, to the said Bay State Trust Company, for collection (the Bay State Trust Company not being a member of the Clearing House Association, and all checks drawn upon them being received by the Merchants' National Bank as an accommodation to them); that said check was received with others by the Bay State Trust Company, in due course of business, as aforesaid, marked 'Paid', and charged to the account of said H. C. Haven, he being a regular customer of said bank, and having an account there; that, when said trust company received said check, it did not discover that it was a forgery, the signature thereto being a close imitation of the signature of said H. C. Haven; that as soon as said Bay State Trust Company discovered that said check was a forgery, namely, some time from July 27 to July 29, 1895, inclusive, it at once returned said check to the National Bank of the Commonwealth, demanding a return of the amount; that the National Bank of the Commonwealth refused to return the amount unless they first

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received it from the Phillips National Bank, from which bank they received said check; that said National Bank of the Commonwealth received said check from the Bay State Trust Company, and immediately forwarded it to the Phillips National Bank, demanding a return of the amount, where it was received by said Phillips National Bank, on July 30, 1895; that the Phillips National Bank returned said check to Furbish, Butler & Oakes on July 30, 1895, demanding the amount thereof of them; that, on the same day, Furbish, Butler & Oakes returned said check to the plaintiffs, demanding the amount of them, which was then and there paid by the plaintiffs to said Furbish, Butler & Oakes; that said Furbish, Butler & Oakes at once remitted the amount to the Phillips National Bank, and they to the National Bank of the Commonwealth, where it was received and paid to the Bay State Trust Company, where it was received and credited to the account of said H. C. Haven, on August 5, 1895; that the plaintiffs offered to return said checks to the defendant, and demanded a return of the amount of him on July 31, 1895, and the defendant agreed to pay the same, and did pay thereon the sum of one hundred dollars, but subsequently refused to pay the balance; that the defendant required no identification of said Crew, nor his right or title to said check, before taking the same; that said Haven has now drawn upon said Bay State Trust Company about 650 checks, and had at the time of the forgery drawn about 350; that said Crew, on June 19, 1895, called at the cottage of said Haven, and procured three genuine checks, as an accommodation, he said, to send away, one for \$50, and two for \$25 each, paying the money for the same, and at the same time stole three blank checks from the back of said Haven's check book, namely, Nos. 998, 999, 1,000; that the check in suit is the blank numbered 1,000; that said Crew, at the time of transferring said check to the defendant, said that Haven wanted him (said Crew) to hold said check until about the 1st of August, before collecting the same, and that he (Crew) would like to have him

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(defendant) hold the same until that time; that said defendant did not impart or make known said request to said plaintiffs. Copy of check to be a part of the case, and original to be transmitted to law court. Upon the foregoing facts, it is agreed that the law court may render such judgment as the law and facts require. If the action is maintainable, defendant to be defaulted for \$150, and interest from date of writ; if not maintainable, plaintiffs to become nonsuit."

Argued before PETERS, C. J., and EMERY, HASKELL, WHITEHOUSE, STROUT, and SAVAGE, JJ.

F. E. Timberlake, J. C. Holman, and F. W. Butler, for plaintiffs.

H. L. Whitcomb and J. P. Seasey, for defendant.

EMERY, J. Haven was a depositor in the Bay State Trust Company, a bank in Boston. A written instrument purporting to be his check upon that bank, payable to Crew or order, was by Crew indorsed for value to Coburn, the defendant. Coburn indorsed it for value to Neal & Quimby. That firm indorsed it for value to Furbish, Butler & Oakes. The latter firm indorsed it for collection to the Phillips National Bank. The Phillips Bank indorsed it for collection to the Commonwealth Bank of Boston, which bank presented it for payment through the clearing house to the Bay State Trust Company, the bank upon which it was drawn. The Bay State Trust Company paid it as Haven's check, marked it "Paid," and charged the amount to Haven's account. Three days afterwards it was discovered that the drawer's (Haven's) signature was forged, and the paper was returned through the same channel to Neal & Quimby, the plaintiffs, who refunded the amount, and in their turn presented it to Coburn the defendant, and demanded of him to refund the amount in his turn, which he refused to do; hence this action for money had and received to enforce such refunding. It is conceded that Neal & Quimby cannot maintain this action unless the Bay State Trust Com-

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pany could do so had all the intermediate indorsers refused to refund. The question therefore is: Assuming the good faith of all parties, 'who shall bear the loss in such case,— the first innocent indorser for value, or the bank which accepted the paper as genuine, and paid it as the check of its depositor?

Since a check belongs to that class of written instruments called "commercial paper," the question stated is not so much one of abstract justice in the particular case, as it is of what is the established or workable rule in this class of cases. Commercial paper has long been governed by special rules, which, while designed to insure justice, are also designed to insure the free and safe use of an indispensable commercial agency. The commercial world needs and seeks for the plain workable rule, rather than for the somewhat uncertain abstract right in each case. We think such a rule, decisive of this case, has been long and firmly established.

A check is in form and nature a species of bills of exchange, and is *pro tanto* governed by the same rules (Foster v. Paulk, 41 Me. 425); hence decisions as to bills of exchange upon this question are applicable to this case. In 1715, in an action by an indorsee against the acceptor of a bill of exchange, tried before Lord Raymond in the king's bench court, sitting at Guildhall, to hear commercial cases, it was held that the acceptance sufficiently proved the signature of the drawer. Evidence offered by the acceptor to affirmatively prove the bill to be a forgery was rejected, one of the reasons given being "the danger to negotiable notes." Jenys v. Fowler, 2 Strange, 931. In 1762, before Lord Mansfield, in the king's bench, then also sitting at Guildhall, was tried an action for money had and received to recover back money paid to an innocent indorsee of a bill of exchange by the drawee. The signature of the drawer was forged. Lord Mansfield stopped the defendant's counsel, saying the case could not be made plainer by argument, and ordered judgment for the defendant. Price v. Neal, 3 Burrows, 1355. In

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1815 the question came before the common pleas also then sitting in London. The banker sought by an action for money had and received to recover back money paid by him to an innocent holder of a bill of exchange bearing a forged acceptance of a correspondent of the banker's. The plaintiff was nonsuited. *Smith v. Mercer*, 6 Taunt. 76. In 1882 the English "Bills of Exchange Act" was passed, "to codify the law relating to bills of exchange, cheques and promissory notes." In section 54 it was enacted that "the acceptor of a bill by accepting it is precluded from denying to a holder in due course the existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the bill." 4 Eng. Ruling Cas. 159, 160. The rule stated by Lord Raymond, in 1715, seems to have become firmly established in that great commercial country.

In this country the earliest published judicial decision upon the question appears to have been made in 1802 by the supreme court of Pennsylvania. An innocent holder of a check for value presented it for deposit to his credit in the bank upon which it was drawn. The bank received it, and credited the amount to the holder, and debited the same to the supposed drawer. It soon proved to be a forgery, whereupon the bank charged the amount back to the holder's account. The holder then brought an action against the bank, and recovered judgment. *Levy v. Bank*, 1 Bin. 27. In 1825 a case similar in principle came before the United States supreme court, which always decides for itself questions of general commercial law as applicable to the whole country. The Bank of the United States remitted to the Bank of Georgia papers purporting to be bank notes of the latter bank, which were received and credited to the account of the former bank. Some days afterwards the supposed notes were found to be counterfeit, and the Bank of Georgia tendered them back to the United States Bank, and charged the amount back to that bank, and refused to acknowledge any indebtedness for them. The United States Bank brought

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an action for balance of account stated, and for money had and received, and was held and entitled to recover the amount so deposited. *Bank of United States v. Bank of Georgia*, 10 Wheat. 333. This decision does not appear to have been questioned in any federal court. The applicability of this decision is manifest when it is recalled that the acceptor of a bill of exchange in the same category as the maker of a note. If one who pays what purports to be his note cannot recover the money back, no more can one who pays what purports to be a bill of exchange or check drawn upon him.

In 1820, five years earlier than the case in 10 Wheat. a similar case occurred in Massachusetts between two banks as to the counterfeit bills of one of them, which it received from the other, and paid as genuine. It was held that it could not recover back the money paid. *Gloucester Bank v. Salem Bank*, 17 Mass. 33. As late as 1890 the supreme court of Massachusetts stated the rule as follows: "In the usual course of business, if a check purporting to be signed by one of its depositors is paid by a bank to one who, finding it in circulation or receiving it from the payee by indorsement, took it in good faith for value, the money cannot be recovered back on the discovery that the check is a forgery." *First Nat. Bank v. First Nat. Bank*, 151 Mass. 282, 24 N. E. 44.

In a New York case, in 1850, the bank upon which a draft was drawn refused payment for want of funds of the drawer, whereupon Goddard, the correspondent of the supposed drawer, being informed of the draft, but without seeing it, left his own check, for its payment, which amount was remitted to the holders of the draft. The next day, Goddard, on seeing the draft, found it to be forged. Held, however, that he could not recover back the amount of the holder. *Goddard v. Bank*, 4 N. Y. 149. In 1871 a bank in New York paid to an innocent holder a forged draft drawn upon it, and then sought to recover the money back. The court rendered judgment for the defendant as in the earlier case, using this language: "For more

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than a century it has been held and decided without question that it is incumbent upon the drawee of a bill to be satisfied that the signature of the drawer of the bill is genuine,— that he is presumed to know the handwriting of his correspondent; and, if he accepts or pays a bill to which the drawer's name has been forged, he is bound by the act, and can neither repudiate the bill nor recover the money paid. * * * A rule so well established and so firmly rooted in the jurisprudence of the country ought not to be overruled or disregarded." *National Park Bank v. Ninth Nat. Bank*, 46 N. Y. 80, 81.

Other courts have also recognized the rule more or less explicitly. *Commercial Bank v. National Bank*, 30 Md. 11; *Germania Bank v. Boutell*, 60 Minn. 192, 62 N. W. 327; *St. Albans v. Farmers' Bank*, 10 Vt. 141; *Star Ins. Co. v. State Bank*, 60 N. H. 442; *Deposit Bank v. Fayette Nat. Bank*, 90 Ky. 22, 13 S. W. 339.

The only allusion to the rule we have found in the published opinions of this court is in *Belknap v. Davis*, 19 Me. 457, in 1841, where, in an action by the holder against the acceptor of a bill of exchange, it was held that "the acceptance admits the signature of the drawer and the authority to draw." So far as it goes, this would seem to be in the same line with the decisions above cited and quoted from, and would seem to indicate that the rule so long and firmly upheld by those decisions is in harmony with the law of commercial paper in this state.

In some cases the courts have been led to inquire whether the condition of the holder had changed between the payment of the check and notice to him of the forgery, and to hold that, if the holder had suffered no loss by reason of the payment, he should refund the amount to the bank or drawer. The rule cited does not make any such distinction,— does not call for any inquiry into the condition of the holder. To do so is to abandon the rule, and with it all certainty. It would leave every person receiving payment on a check in complete uncertainty as to whether

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and when it was in fact finally paid. It would be a destructive blow to the usefulness of checks as an instrumentality of trade. It is also against the reason and equity of the rule as stated by the courts recognizing it, and hence is inconsistent with the rule. Wherever the rule is upheld, the doctrine of such cases must be rejected.

The reason usually given for the rule is that it is impracticable for the indorsee or holder of a bill of exchange or check to know or learn whether the signature of the drawer is genuine, and that the bank or other drawee has the best means of knowing or learning the fact; or, as sometimes expressed, the bank may be presumed to know the signature of its depositor, and the acceptor the signature of his business correspondent. Lord Mansfield, in *Price v. Neal*, *supra*, compared the equities. He said that the action for money had and received could not be maintained, unless it was against conscience in the defendant to retain it, and that it was not against conscience for an innocent holder to retain money paid to him by the drawee of a bill of exchange which he had in good faith paid value for. As between parties equally innocent, there seems to be no more equity in throwing off the loss from one to the other than in leaving it where it fell. In cases like these, however, where the loss fell in the regular course of business upon the bank, which could have known and should have known the forgery, it seems positively inequitable to throw off that loss upon an innocent man who had much less opportunity of knowing. As also said by Lord Mansfield, in *Price v. Neal*, if negligence is to be considered, it was as much, if not more, in the drawee or bank, as in the holder. But whatever the reason or equity of the rule, and however much it may be criticised by text writers and theorists, it has been so long established and so explicitly recognized by the courts in commercial communities that it should stand as the rule until modified by legislative

Banks—Signature
of Depositor—Pre-
sumption of
Knowledge.

Forged Checks—
Payment by
Mistake.

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action. It evidently has been found to be a workable rule, and its plainness and certainty should not be obscured by fine judicial distinctions, confusing to the lay mind.

It has been suggested that this rule breaks against another rule of the law of commercial paper, *viz.* that the defendant, by indorsing the check, guaranteed to every subsequent holder the genuineness of the signature of the drawer. But the bank upon which the check was drawn did not become a holder. It did not purchase the check.

Same—Liability
of Prior Holder.

The bank paid it,—extinguished it. It was no longer a check, and could no longer have a holder as such. It had become merely a voucher. *Bank v. Maxfield*, 83 Me. 576, 22 Atl. 479.

The plaintiffs cite cases in which it was found that the bank was induced by the conduct of the holder to assume the check to be genuine without investigation. In other cases it was found that the holder knew or had reason to know of the forgery, or was put upon inquiry before taking the check. In these cases it was held that the holder was without the rule.

In this case, however, no such facts can be found. Haven, the supposed drawer, was occupying a summer cottage in the neighborhood. The check was written upon one of his blanks taken from his check book. The signature was so good an imitation that the bank accepted it. Crew, the forger, had previously received genuine checks from Haven. He was a boarder at the defendant's hotel or boarding house. While, after the event, the defendant now believes Crew to have been an impostor, nothing in the case shows that he so believed or had reason to so believe before the event. It is true, he was told by Crew that Haven desired the check to be held about three weeks before presentment; but that was no reason for suspecting the genuineness of the signature. It might have generated a doubt as to the solvency of Haven, but no more. While, perhaps, a banker would have hesitated to accept the check under the circumstances,

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we find in them nothing that would naturally have deterred a man like the plaintiff. In the New York case, *Goddard v. Bank*, *supra*, the circumstances surrounding the transfer of the check from the forger to the first holder were even more suspicious than here, and were held to be insufficient to affect the holder.

We find the plaintiff was an innocent holder for value, and that the loss by the forgery fell, in the course of business, upon the bank. We hold that the defendant, though he has suffered no loss, is protected by the rule cited, and that, under the rule, the loss cannot be thrown off the bank upon him.

It is conceded that the defendant's verbal promise to refund, made under a misapprehension of the law, was without consideration, and hence not binding.

Plaintiffs nonsuit.

NOTES.

Banks—Forgery—Signature of Customer—Payment by Mistake—Loss.—A bank is bound to know the signature of its depositor, and therefore if it pays out money on a check to which its depositor's name has been forged, to a *bona fide* holder for value, it cannot recover the money so paid out.

England.—*Smith v. Mercer*, 6 Taunt. 76; *Price v. Neale*, 3 Burr. 1355; *Bass v. Clive*, 4 M. & S. 13; *Pooley v. Brown*, 11 C. B. N. S. 566, 103 E. C. L. 566; *Smith v. Chester*, 1 T. R. 655; *Barber v. Ginglell*, 3 Esp. N. P. 60.

United States.—*U. S. Bank v. Georgia Bank*, 10 Wheat. (U. S.) 339.

California.—*Redington v. Woods*, 45 Cal. 406, 13 Am. Rep. 190.

Illinois.—*Quincy First Nat. Bank v. Ricker*, 71 Ill. 439; *Chicago First Nat. Bank v. North Western Nat. Bank*, 152 Ill. 296, 43 Am. St. Rep. 247.

Kentucky.—*Deposit Bank v. Fayette Nat. Bank*, 90 Ky. 10.

Louisiana.—*Laborde v. Consolidated Assoc.*, 4 Rob. (La.) 190, 39 Am. Dec. 517; *Howard v. Mississippi Valley Bank*, 28 La. Ann. 727, 26 Am. Rep. 105.

Maryland.—*Commercial, etc., Bank v. Baltimore First Nat. Bank*, 30 Md. 11, 96 Am. Dec. 554; *Hardy v. Chesapeake Bank*, 51 Md. 562, 34 Am. Rep. 325.

Massachusetts.—*Gloucester Bank v. Salem Bank*, 17 Mass. 33; *Mackintosh v. Eliot Nat. Bank*, 123 Mass. 393; *Danvers First Nat. Bank v. Salem First Nat. Bank*, 151 Mass. 280.

Minnesota.—*Germania Bank v. Boutell*, 60 Minn. 189, 51 Am. St. Rep. 519; *Bernheimer v. Marshall*, 2 Minn. 78, 72 Am. Dec. 79.

Nebraska.—*Orleans First Nat. Bank v. State Bank*, 22 Neb. 769, 3 Am. St. Rep. 294.

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New Hampshire.—*Star F. Ins. Co. v. State Nat. Bank*, 60 N. H. 442.

New York.—*National Bank v. Grocers' Nat. Bank*, 35 How. Pr. (N. Y. C. Pl.) 412; *Salt Springs Bank v. Syracuse Sav. Inst.*, 62 Barb. (N. Y.) 101; *Bank of Commerce v. Union Bank*, 3 N. Y. 230; *Goddard v. Merchants' Bank*, 4 N. Y. 147; *National Park Bank v. New York Ninth Nat. Bank*, 46 N. Y. 77, 7 Am. Rep. 310; *White v. Continental Nat. Bank*, 64 N. Y. 316, 21 Am. Rep. 612; *National Bank of Commerce v. National Mechanics' Banking Assoc.*, 55 N. Y. 211, 14 Am. Rep. 232; *Frank v. Chemical Nat. Bank*, 84 N. Y. 209, 38 Am. Rep. 501; *Carthage First Nat. Bank v. Yost*, 58 Hun (N. Y.) 606, 34 N. Y. St. Rep. 180.

Pennsylvania.—*Levy v. U. S. Bank*, 4 Dall. (Pa.) 234.

Texas.—*Rouyant v. San Antonio Nat. Bank*, 63 Tex. 610.

Vermont.—*St. Albans Bank v. Farmers', etc., Bank*, 10 Vt. 141, 33 Am. Dec. 188.

West Virginia.—*Johnston v. Commercial Bank*, 27 W. Va. 343, 55 Am. Rep. 315.

In *Price v. Neale*, 3 Burr, 1355, decided in 1762, the drawee had accepted and paid two bills of exchange which had been forged by one Lee, who, as the reporter observes, "has been since hanged for forgery." The drawee sued the holder to recover back the money paid. It was held that the plaintiff could not recover. Lord Mansfield said; "It was incumbent upon the plaintiff to be satisfied that the bill drawn upon him was the drawer's hand before he accepted or paid it; but it was not incumbent upon the defendant to inquire into it. * * * The plaintiff lies by for a considerable time after he has paid these bills, and then found out that they were forged, and the forger comes to be hanged. He made no objection to them at the time of paying them. Whatever neglect there was, was on his side."

In deciding a case upon the question as to whether a bank could recover money paid out on its own bank notes, PARKER, C. J., in *Gloucester Bank v. Salem Bank*, 17 Mass. 42, uses this language: "The question in this case is whether, as between these parties equally innocent and ignorant, the loss shall remain where the chance of business has placed it, or shall be shifted back upon the Salem Bank, who may be considered as having, by good fortune, rid themselves of it. In all such cases, the just and sound principle of decision has been that if the loss can be traced to the fault or negligence of either party, it shall be fixed upon him. Generally, where no fault or negligence is imputable, the loss has been suffered to remain where the course of business placed it."

"This has been the rule almost universally laid down by the courts, the law declaring that as between parties equally innocent the loss must remain where the course of business has placed it. With singular unanimity, however, the text writers have modified this rule with the proviso, "unless it can be shown that the payee or indorsee, the party receiving the money, will in no way be prejudiced by the re-payment."

"Many modern text writers, some of them of learning and ability, have assailed the correctness of this doctrine, contending that the general rule as to money paid under mistake of fact should apply, and that the law ought to be that the bank, although at fault in not discovering the forgery of its customer's signature, can recover even

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from an innocent holder, if he will then be in no worse condition than if the bank had refused to pay the draft or check. 2 Pars. Notes and Bills, 80; Morse on Banks and Banking, c. 33; Dan. Neg. Instr. c. 42; Am. Law Rev., April, 1875, p. 411; note to People's Bank v. Franklin Bank, 88 Ten. 299, 17 Am. St. Rep. 884. We shall not enter upon a consideration of the soundness of the argument against the doctrine, or as to which rule we would adopt if the question was *res integra*, because we do not feel at liberty to overrule or disregard a doctrine so well established and so firmly rooted in the commercial law of the country. If the rule is incorrect or works badly in practice, its change must be left to the legislature. We may say, however, that the opponents of the doctrine seem to have found no followers in the courts. We may also suggest that perhaps the courts themselves have given the opponents of this doctrine an unnecessary vantage ground, by frequently placing it exclusively on the narrow ground of actual negligence on part of the drawee in not discovering the forgery, because he was bound to know the signature of his own customer or correspondent. It is undoubtedly true that he is in a better position than a stranger to know his customer's signature, and that men have a right to deal with checks and drafts on that assumption; but it does not seem to us that the doctrine rests entirely on this narrow basis of actual negligence on the part of the drawee. The money of the commercial world is no longer coin. The exchanges of commerce are now made almost entirely by means of drafts and checks. It was largely in deference to these facts that the recovery of money paid on paper of this kind, to which the drawer's signature was forged, was made an exception to the general rule as to the recovery of money paid out under mistake of fact." *Per* MITCHELL, J., in *Germania Bank v. Boutell*, 60 Minn. 192, 51 Am. St. Rep. 519.

The text writers are in almost universal opposition to the rule as stated in the above, but the only case that supports them is *People's Bank v. Franklin Bank*, 88 Tenn. 299, 17 Am. St. Rep. 884.

In *Commercial, etc., Bank v. Baltimore First Nat. Bank*, 30 Md. 11, 96 Am. Dec. 554, H., a stranger of respectable appearance, opened an account with the former bank, and deposited a check on the latter bank for four thousand six hundred dollars, purporting to have been drawn by A. to the depositor's order. On the following day it was sent through the clearing house, and the drawee bank pronounced the check genuine and charged it to A's account. H., two days afterwards, called at the Commercial Bank with his bank book, filled up a check for four thousand five hundred dollars, payable to his order, which was paid by the teller after inquiry as to his identity and the state of his account. One week afterwards it was discovered that the check was a forgery, and notice thereof was given to the Commercial Bank and repayment of the money demanded. Upon refusal, the First National Bank, having refunded to A. the amount of the forged check, sued the Commercial Bank to recover the amount thus paid. It was held that the bank was bound to know its depositor's signature, and that the plaintiffs were not entitled to recover. The court said: "There is * * * no reason why the loss as between parties thus equally innocent and equally deceived, but where one is bound to know and act upon his knowledge, and the other has no means of knowledge, should be thrown upon the latter in exoneration of the former. The safest rule for

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the commercial public, as well as that most consistent with justice, is to allow the loss to remain where, by the course of business, it has been placed."

In *Deposit Bank v. Fayette Nat. Bank*, 90 Ky. 22, in deciding that the drawee bank could not recover money paid out to another bank on a forged check of one of its depositors, PRYOR, J., uses this language. "There is no precedent in this court on the question, still we are not inclined to follow the views of text writers, in the face of so many adjudications on the subject, and with no case presented that goes further than to modify the rule in cases where bad faith or negligence is to be attributed to the holder or indorser when taking the check."

Statute in Pennsylvania.—The law has been changed by statute in Pennsylvania (Act of April 5, 1849, P. L. 426), under which the mere acceptance or payment of forged paper is no longer of itself a bar to the recovery of the money from the party receiving it, even though it be a bank or drawee; but, in order to recover under this statute, notice of the discovery of the forgery must be given promptly. *Trademen's Nat. Bank v. Third Nat. Bank*, 66 Pa. St. 435; *Chambers v. Union Nat. Bank*, 78 Pa. St. 205; *Corn Exch. Nat. Bank v. National Bank of Republic*, 78 Pa. St. 233; *Iron City Nat. Bank v. Fort Pitt Nat. Bank*, 159 Pa. St. 46.

A bank received a check on December 19, paid it and entered it on its books as paid, and then dismissed it from further attention. Five days afterwards the bank's attention was called to the check, and an investigation was made which resulted in the discovery that the drawee's name had been forged. In the meantime, the defendant bank, which had received the money, paid it out. Under these circumstances the court held that there was a want of the due diligence required by the statute, and the bank was not entitled to recover the money back. *Iron City Nat. Bank v. Fort Pitt Nat. Bank*, 159 Pa. St. 46.

FIRST NAT. BANK OF MARSHALLTOWN

v.

MARSHALLTOWN STATE BANK.

(Supreme Court of Iowa, Jan. 25, 1899.)

Payment of Forged Check—Recovery.*—Where a bank upon which a check is drawn pays it upon the forged signature of the drawer, to a good-faith holder, the money cannot be recovered from such holder as paid under a mistake of fact; unless the holder was negligent in not making due inquiry when he took the check.

Same—Same—Negligence.—The negligence of the bank which cashes a check and puts it into circulation cannot be imputed to

*See *Neal et al. v. Coburn* (Me.), *ante*, and *notes*.

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another bank to which it is sent, and by which it is credited to the first mentioned bank.

Same—Forged Indorsement.—Where a check to which the signature of the drawer is forged is paid by the drawee bank to a good-faith holder, the fact that the payee's indorsement is also forged is immaterial to the drawee.

APPEAL by plaintiff from Marshall county district court. *Affirmed.*

One F. M. Smith, having in his possession a check drawn on plaintiff bank, payable to the order of Smith & Hauser, and purporting to be signed by one J. R. Bradbury, indorsed the payee's name thereon, and presented it to the Citizens' Bank of Union, and obtained of this bank the cash therefor. This last-named bank indorsed the check as follows: "Pay F. A. Balch, cashier, or order. Citizens' Bank, Union, Iowa, C. E. Lawrence, Cashier,"—and forwarded it to the Marshalltown State Bank, of which Balch was cashier, and received credit for the amount thereof on the books of the last-named bank. The transaction was concluded by the Marshalltown State Bank indorsing the check, and presenting it to plaintiff bank, which cashed it. Bradbury, the purported drawer of the check, was a depositor in the last-named bank. A few days after the check was paid, plaintiff discovered that the signature of the drawer was forged, and thereafter this action was begun, to recover the amount paid. A jury was waived by the parties, and the case tried to the court. From a judgment in defendant's favor, plaintiff appeals. *Affirmed.*

Binford & Snelling, for appellant.

C. E. Albrook and *E. F. Binford*, for appellee.

WATERMAN, J. A few facts in addition to those stated above are shown by the record, and something is claimed for them by the parties. We shall set them out, although, in our view of the case, they do not affect the conclusion at which we arrive. One Hauser was engaged in business near Union, and Smith, whose

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misdeed gives rise to this contention, was stopping with him. Shortly prior to the transaction complained of, Hauser sold some live stock to Bradbury, and Smith, who collected the money therefor, took from Bradbury a check, payable to the order of Smith & Hauser. This check Smith indorsed in the name of Smith & Hauser, and cashed at the bank of Union. There was in fact no such firm as Smith & Hauser. The testimony shows that the check we are now speaking of was made by Bradbury, payable to the firm, at Smith's request, and that Hauser knew nothing of this fact, or of Smith's indorsement of the paper.

2. Some of the text writers on negotiable paper lay down the rule that, when a bank upon which a check is drawn pays it upon the forged signature of the drawer, the money can be recovered as paid under a mistake of fact. Story, *Prom. Notes*, §§ 379, 529; 2 *Pars. Notes & B.* 80. Others, while recognizing a different rule, incline to the opinion that the one just stated is the most equitable. 2 *Daniel, Neg. Inst. c.* 48, § 13. But, whatever the text writers may think, a long line of authority sustains the proposition that, as between the drawee and a good-faith holder of a check, the drawee bank is to be deemed the place of final settlement, where all prior mistakes and forgeries shall be corrected and settled at once for all; and if overlooked, and payment is made, it must be deemed final. There can be no recovery over. *Price v. Neal*, 3 *Burrows*, 1355; *Redington v. Woods*, 45 *Cal.* 406; *Bank v. Ricker*, 71 *Ill.* 439; *First Nat. Bank of Chicago v. Northwestern Nat. Bank*, 152 *Ill.* 296, 38 *N. E.* 739; *Deposit Bank of Georgetown v. Fayette Nat. Bank*, 90 *Ky.* 10, 13 *S. W.* 339; *Commercial & Farmers' Nat. Bank of Baltimore v. First Nat. Bank of Baltimore*, 30 *Md.* 11; *Star Fire Ins. Co. v. New Hampshire Nat. Bank*, 60 *N. H.* 442; *Bank v. Peyton* (*Tex. Civ. App.*) 39 *S. W.* 223; *St. Albans Bank v. Farmers' & Mechanics' Bank*, 10 *Vt.* 141; *National Park Bank of New York v. Ninth Nat. Bank*, 46 *N. Y.* 77; *Bank v. Boutell* (*Minn.*)

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62 N. W. 327. See, further, 5 Am. & Eng. Enc. Law, 1071. This doctrine is founded by some courts upon the thought that the drawee bank is conclusively presumed to know the signatures of its depositors. This, however, may be too narrow a basis. It may be well that such a rule is demanded by the necessities of business in these times, when the currency of the commercial world is composed so largely of checks and drafts. Whether it is the better rule or the one most consonant with reason and justice is no longer an open question. The discussion seems to have been foreclosed by the overwhelming weight of authority. The rule, however, has one qualification, introduced by some cases, and which we feel inclined to adopt. When the holder of the check has been negligent in not making due inquiry, if the circumstances were such as to demand an inquiry, when he took the check, the drawee may recover. Tied. Com. Paper, § 399; First Nat. Bank of Orleans v. State Bank of Alma (Neb.) 36 N. W. 289; First Nat. Bank of Danvers v. First Nat. Bank of Salem, 151 Mass. 280, 24 N. E. 44. The appellant seeks to bring its case within this exception. But the only negligence charged here is against the Bank of Union, which first cashed the check, and put it in circulation.

Clearly, the negligence, if any, of that bank, cannot be imputed to the defendant. If the plaintiff had desired to take advantage of this qualification of the rule, its action, under the facts here shown, should have been against the bank which first gave currency to the paper. That was the course taken in the Nebraska case cited above.

3. Plaintiff claims, further, some rights from the fact, as it asserts, that the indorsement of Smith & Hauser was forged. The signing of a fictitious name may be a forgery. People v. Warner (Mich.) 62 N. W. 405. We concede the general proposition contended for by appellant that an indorsement of negotiable paper is a guaranty of the genuineness of all prior indorsements, though we must add that this rule has no applicability-

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under the facts of this case. If, by reason of this forged indorsement, plaintiff has been led to pay this check to one not the owner of it, no doubt it could recover from any prior indorser upon whose guaranty it had a right to rely. *Levy v. Bank (Neb.)* 43 N.W. 354. But how has plaintiff been injured by this so-called "forgery" of an indorsement? The party to whom it paid the money was entitled to it, if the payment was to be made at all. If the indorsement had been genuine, it could not have recovered from Smith & Hauser on the ground that they were indorsers; for, as we have seen, as between all good-faith parties to the check, its payment by the drawee is final. If Smith, who actually made this indorsement, did so in bad faith, and with knowledge of the forgery, he is still liable to the bank, not on his indorsement, but because of his fraud. The drawee ordinarily has no recourse upon indorsers. If an indorsement is forged, yet, if the money is paid to the party entitled to it, the drawee has no reason to complain, and no right of action over. That is the case here. Plaintiff is liable to no one else for the amount of the check. It is in no worse situation than it would have been had the signature of Smith & Hauser been genuine. Affirmed.

GUTHRIE NAT. BANK

v.

GILL.

(Supreme Court of Oklahoma, Feb. 18, 1898.)

Drafts—Refusal to Pay—Liability of Bank.*—A draft drawn in the ordinary form does not constitute an equitable assignment *pro tanto* of funds in the hands of the drawee to the credit of the drawer before such draft has been accepted or presented for payment.

Deposits—Rights of Check Holder.—There is an implied promise on the part of a bank, when receiving deposits, to pay them out, on

*See notes at end of case.

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the checks of the depositor, to any person in whose favor he may draw the same; and the check holder is subrogated to the rights of the depositor in so much of the deposits as the check may call for, remaining in the bank to the credit of the depositor at the time when such draft is presented for payment.

Same—Drafts—Presentation—Prior General Assignment by Depositors.—Where a depositor makes a draft, on a bank in which he has funds to his credit, and afterwards makes a general assignment for the benefit of his creditors, and the holder of such draft presents the same to the drawee for payment after such assignment is made, and payment is refused, he cannot maintain an action against the drawee, and recover on said draft, although at the time the draft was presented for payment the drawee did not know of the assignment, but learned of such assignment before making payment, and by reason of such knowledge refused payment.

(Syllabus by the Court.)

ERROR by defendant from Logan county probate court. *Reversed.*

S. L. Overstreet (*Herod & Widmer* and *W. B. Herod*, of counsel), for plaintiff in error.

George S. Green, for defendant in error.

TARSNEY, J. On February 20, 1897, the Bank of Mulhall, by its cashier, made its draft, payable to the order of J. R. Keaton, for the sum of \$156.05, directed to the plaintiff in error. On March 2, 1897, Keaton indorsed the draft to the order of the defendant in error. At the close of business on March 11, 1897, plaintiff in error held on deposit to the credit of the Bank of Mulhall the sum of \$364.69. At 1 o'clock on the morning of March 12, 1897, the Bank of Mulhall made a general assignment of all its property, credits, and effects to George E. Billingsley, for the benefit of its creditors. Billingsley accepted the trust about 7 o'clock a. m. of that day, and at that hour took possession of the place of business of the Bank of Mulhall, and all the effects contained therein, and at 8 o'clock and 40 minutes a. m. of the same day filed the deed of assignment for record in the office of the register of deeds for Logan county, and afterwards, in due time, and as required by law, filed an inventory of the assets and liabilities of said bank. About 8 o'clock a. m. of

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said 12th day of March, 1897, plaintiff in error received through the mail a letter from the First National Bank of Oklahoma City inclosing for collection the draft in controversy. The Oklahoma City Bank was a correspondent of plaintiff in error's bank, and at the time had an account therein. Between 8:45 and 9 o'clock of the morning of the said 12th day of March the paying teller of said plaintiff in error bank stamped said draft with a stamp of said bank, marking it "Paid," and placed the draft and the letter accompanying the same in a file used for that purpose, to await future action, *viz.* the making of the proper entries upon the books of said bank, crediting the account of the Oklahoma City Bank with the amount of said draft, and charging the account of the plaintiff in error bank with the Oklahoma City Bank with the amount thereof. Such entries were never made, for the reason that, immediately after said draft was so stamped, plaintiff in error received a telegram from said assignee notifying it that he had been made assignee of the Bank of Mulhall, and not to pay any drafts or orders drawn by said bank. Upon the receipt of this telegram the president of the plaintiff in error bank immediately directed said paying teller to erase the stamp that had been placed upon said draft, and to refuse the payment thereof. Such erasure was made, and the draft placed in the hands of a notary for protest, and the same was protested for nonpayment. The paying teller testifies that, if payment had not been stopped, in the course of business that would have been pursued to have completed the payment, at 3 or 4 o'clock of the afternoon of that day entries would have been made on the journal of the bank charging the amount of the draft to the Bank of Mulhall, crediting the amount thereof to the balance due the Oklahoma City Bank, and such entries would have to be carried into other books, *viz.* a ledger and the bank's general balance ledger, and that, when such entries would have been made, notice would have been sent to the Oklahoma City Bank; that none of these entries were made upon the books, and no notice was given.

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The defendant in error contends that the giving of a check or the issuance of a draft is an equitable assignment of enough of the funds in the hands of the drawee at the time the check is given or the draft issued to satisfy such check or draft, but concedes that upon this point the authorities are in conflict, and further concedes that this court might feel obliged to follow the rule of the supreme court of the United States upon the question, and that upon this point the recent case of *Bank v. Yardley*, 165 U. S. 634, 17 Sup. Ct. 439, and the previous decisions of said court thereon (*Bank v. Millard*, 10 Wall. 152; *Bank v. Whitman*, 94 U. S. 343) are in conflict with defendant in error's contention. In these cases it is held that, as between the holder and the bank upon which such check or draft is drawn, it is settled that, unless the check or draft be accepted by the bank, an action cannot be maintained by the holder against the bank. On the other hand, it is held by a very respectable line of authorities that a check drawn upon an existing fund in a bank is an absolute transfer or appropriation to the holder of the amount of said funds designated in the check then in the hands of the drawee; that a bank receives deposits on the expressed or implied promise to pay them out upon the checks of the depositors, and that the depositor may draw his check for a small or large amount, payable to his creditors or those to whom he desires to pay money, and the bank, by receiving the deposit, impliedly promises to pay such checks, by whomsoever presented; and that the holder of such check may sue the bank refusing payment, though there be no acceptance. It is not necessary to a decision in this case that we should determine whether this court is absolutely required to follow a rule of decision of the supreme court of the United States in matters other than those involving federal questions, or, should we hold the negative of that proposition, to examine and determine between the conflicting authorities presented; for, as we understand those authorities, the ques-

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tion in conflict does not arise upon the facts of this case. As we interpret the authorities that are in conflict with the rule of the supreme court of the United States concerning the necessity for an acceptance by the drawee to authorize an action against him by the holder, they do not go to the extent of holding that the mere making and delivery of the draft to the payee gives a right of action against the drawee by the holder, but that to create such right of action such draft must be presented for payment, and that there must be funds in the hands of the drawee at the time to the credit of the drawer. In this case no question arises as to time when the draft was presented, nor is there any contest between the defendant in error and other check holders. The contest is between the holder and the drawee, and the question is, had the bank sufficient funds of the drawer when the draft was presented? If it had, it should have paid the draft, failing in which the action was properly brought. On the contrary, if it had no funds, or not sufficient funds, of the drawer, when the draft was presented, to pay the same, it cannot be held liable in this action. The real question therefore is, were there funds in the hands of the plaintiff in error belonging to the Bank of Mulhall which plaintiff in error was authorized and obligated to appropriate to the payment of this draft at the time it was presented for payment? As we view this case, there is no question of acceptance or payment in it. Plaintiff in error cannot be held as an acceptor, there being no evidence in the record to establish any such relation. Whatever might be the effect of the action of the paying teller in stamping the draft as tending to establish an actual payment, it had no tendency to establish an acceptance. Acceptance and payment are essentially and inherently different. The one is an agreement or promise to do something. The other is the actual doing of that which had been previously promised. There can be no doubt that the act of the paying

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teller was an act done in contemplation of payment, but there was no completed payment. The payment would not be complete until the accounts of the several parties interested had been adjusted on the books of the plaintiff in error, and notice sent to the party credited by such payment. Until the transaction was thus completed, it was inchoate, and plaintiff in error might, for lawful cause, suspend or refuse to complete such payment. The word "Paid" stamped upon the draft does not indicate a promise. It implies none of the elements of an agreement, and, if it did, it would yet be incomplete to make an acceptance. An acceptance is not complete until the instrument has been returned to the holder. So long as the bill remains in the hands of the drawee, although he may have written an acceptance upon it, the acceptance is not fully binding; and he may, at least while he has not communicated the fact of his acceptance to the holder, obliterate his acceptance, and redeliver the bill, without incurring any liability as acceptor. 4 Am. & Eng. Enc. Law (2d Ed.) 212. We do not deny the doctrine that the drawee of a bill of exchange, although not expressly accepting it, may so deal with it that the law will infer an acceptance on his part, but the general rule relative to such an acceptance is that only such language or conduct on the part of the drawee as justifies the holder in believing that the drawee consents to pay the bill will operate to bind such person as an acceptor. 4 Am. & Eng. Enc. Law (2d Ed.) 219, and cases cited. But this doctrine of implied or constructive acceptance cannot apply in this case, because the holder could not have been justified in concluding that the drawee intended to bind itself by its act of stamping the draft, for the reason that the holder had no knowledge of such act until the draft was returned protested. The only theory, in our view, upon which, under either line of such conflicting authorities, defendant in error's right to a recovery can be urged, is independent of any action of the paying teller of the bank, *viz.* that when the draft reached the bank for collection there was a fund

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in the bank, belonging to the drawer, with which to pay the draft; that the making of the draft operated, upon its presentation for payment, as an equitable assignment of so much of the funds of the maker then in the hands of the drawee as would pay such draft. But the facts of this case do not support this theory, as at the time the draft was presented there were no funds in the bank to the credit of the maker of the draft; such funds and credit having been previously assigned in trust for the benefit of the creditors of the maker of the draft.

We do not think it material that plaintiff in error did not know of the assignment when the draft reached the bank for collection. Such knowledge might be material if the draft had been paid, and this were an action by the assignee to recover the fund, but as between the holder of the draft and the bank it is not material. The defendant in error cannot recover upon the equities which plaintiff in error might have in an action against it by the assignee had the draft been paid, but must recover, if at all, upon the theory that the funds upon which it was drawn remained the property and funds of the drawer until the draft was presented for payment, and this involves the theory that the assignment did not operate to divest the assignor of ownership and control of the funds on which the draft was drawn until the drawee had knowledge of such assignment. This theory cannot be sustained. The assignment, when it was executed, and the trust accepted by the assignee, operated *eo instanti* to divest the assignor of ownership and control of the property assigned, and vest such ownership and control in the assignee for the benefit of creditors generally, and thereafter the holder of a draft unpresented for payment is not entitled to payment in full out of any fund upon which it was drawn, but must prorate with the other creditors. We are of the opinion that the court below erred in sustaining the demurrer to the second paragraph of the answer of the defendant, and in overruling the motion for a new trial; and the judgment herein is reversed,

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and the cause dismissed. All the judges concur, except KEATON, J., not sitting.

NOTES.

REFUSAL TO HONOR CHECK—LIABILITY OF BANK TO HOLDER.

The question as to whether the holder of an uncertified check, before acceptance or some equivalent act, has a right of action against a bank improperly refusing to honor the same is unsettled, the weight of authority in the United States and England denying the liability, and the leading text writers and some of the states asserting it.

(1) **Liability Denied.**—The grounds assigned for the denial of such liability are: (a) that prior to acceptance there is a want of privity of contract between the bank and the holder; (b) that an ordinary check in usual form is simply an order, subject to be countermanded or revoked at any time before payment and does not operate as an assignment legal or equitable or create a lien; (c) that as the depositor could also sue thereon, the bank would be subject two actions on one promise if right of action were given the holder also; (d) that it should not be subjected to distinct demands by several persons, thereby causing it great embarrassment by compelling it to settle conflicting demands of check holders.

The following authorities advance the foregoing grounds:

(a) **Want of Privity.**—*England.*—Schroeder *v.* Central Bank, 34 L. T. N. S. 736; Warwick *v.* Rogers, 5 M. & G. 374, 44 E. C. L. 374.

United States.—Bank of Republic *v.* Millard, 10 Wall. (U. S.) 152; Washington First Nat. Bank *v.* Whitman, 94 U. S. 343; Rosenthal *v.* Mastin Bank, 17 Blatchf. (U. S.) 318; Laclede Bank *v.* Schuler, 120 U. S. 511; St. Louis, etc., R. Co. *v.* Johnston, 133 U. S. 566.

Alabama.—National Commercial Bank *v.* Miller, 77 Ala. 168, 54 Am. Rep. 50.

Arizona.—Satterwhite *v.* Melczer, (Arizona 1890) 24 Pac. Rep. 184.

Colorado.—State Nat. Bank *v.* Boettcher, 5 Colo. 185, 40 Am. Rep. 142.

Indiana.—National Bank *v.* Lafayette Second Nat. Bank, 69 Ind. 479, 35 Am. Rep. 236; Griffin *v.* Kemp, 46 Ind. 172.

Massachusetts.—Bullard *v.* Randail, 1 Gray (Mass.) 605, 61 Am. Dec. 433; Dana *v.* Boston Third Nat. Bank, 13 Allen (Mass.) 448, 90 Am. Dec. 216; Carr *v.* National Security Bank, 107 Mass. 45, 9 Am. Rep. 6.

Michigan.—Grammel *v.* Carmer, 55 Mich. 201, 54 Am. Rep. 363 (SHERWOOD, J., *dissenting*); Moore *v.* Davis, 57 Mich. 251; Brennan *v.* Merchants', etc., Nat. Bank, 62 Mich. 343; Dickinson *v.* Coats, 18 Cent. L. J. 71.

New Jersey.—Creveling *v.* Bloomsbury Nat. Bank, 46 N. J. L. 255, 50 Am. Rep. 417.

New York.—Van Alen *v.* American Nat. Bank, 52 N. Y. 4; Tyler *v.* Gould, 48 N. Y. 682; Duncan *v.* Berlin, 60 N. Y. 151; Atty. Gen. *v.* Continental L. Ins. Co., 71 N. Y. 325, 27 Am. Rep. 55; Union Mills First Nat. Bank *v.* Clarke, 134 N. Y. 368; Viets *v.* Union Nat. Bank, 101 N. Y. 572, 54 Am. Rep. 743.

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North Carolina.—Hawes *v.* Blackwell, 107 N. Car. 196, 22 Am. St. Rep. 870.

Ohio.—Covert *v.* Rhodes, 48 Ohio St. 66; Metropolitan Bank *v.* Cincinnati, etc., R. Co., 27 Ohio L. J. 105.

Pennsylvania.—Saylor *v.* Bushong, 100 Pa. St. 23, 45 Am. Rep. 353; Northumberland First Nat. Bank *v.* McMichael, 106 Pa. St. 460.

Tennessee.—Planters' Bank *v.* Keesee, 7 Heisk. (Tenn.) 200; Pickle *v.* Muse, 88 Tenn. 380, 17 Am. St. Rep. 900; Imboden *v.* Perrie, 13 Lea (Tenn.) 504.

Virginia.—Purcell *v.* Allemong, 22 Gratt. (Va.) 742.

Leading Case.—The case of Bank of Republic *v.* Millard, 10 Wall. (U. S.) 152, is the leading case on the subject in this country. MR. JUSTICE DAVIS in delivering the opinion of the court, said; "It is no longer an open question in this court, since the decision in the cases of Marine Bank *v.* Fulton Bank, 2 Wall. (U. S.) 252, and of Thompson *v.* Riggs, 5 Wall. (U. S.) 663, that the relation of banker and customer, in their pecuniary dealings, is that of debtor and creditor. It is an important part of the business of banking to receive deposits, but when they are received, unless there are stipulations to the contrary, they belong to the bank, become part of its general funds, and can be loaned by it as other moneys. The banker is accountable for the deposits which he receives as a debtor, and he agrees to discharge these debts by honoring the checks which the depositors shall from time to time draw on him. The contract between the parties is purely a legal one, and has nothing of the nature of a trust in it. * * * As checks on bankers are in constant use, and have been adopted by the commercial world generally as a substitute for other modes of payment, it is important, for the security of all parties concerned, that there should be no mistake about the status which the holder of a check sustains towards the bank on which it is drawn. It is very clear that he can sue the drawer if payment is refused, but can he also, in such a state of case, sue the bank? * * * On principle, there can be no foundation for an action on the part of the holder, unless there is a privity of contract between him and the bank. How can there be such a privity when the bank owes no duty and is under no obligation to the holder? The holder takes the check on the credit of the drawer in the belief that he has funds to meet it, but in no sense can the bank be said to be connected with the transaction. If it were true that there was a privity of contract between the banker and holder when the check was given, the bank would be obliged to pay the check although the drawer, before it was presented, had countermanded it and although other checks, drawn after it was issued, but before payment of it was demanded, had exhausted the funds of the depositor. If such a result should follow the giving of checks, it is easy to see that bankers would be compelled to abandon altogether the business of keeping deposit accounts for their customers. If, then, the bank did not contract with the holder of the check to pay it at the time it was given, how can it be said that it owes any duty to the holder until the check is presented and accepted? * * * It may be, if it could be shown that the bank had charged the check on its books against the drawer, and settled with him on that basis, that the plaintiff could recover on the count for money had and received, on the ground that the rule *ex æquo et bono* would be applicable, as the bank, having assented to the order and

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communicated its assent to the paymaster, would be considered as holding the money thus appropriated for the plaintiff's use, and therefore under an implied promise to him to pay it on demand."

The same view is adopted in *Atty. Gen. v. Continental L. Ins. Co.*, 71 N. Y. 325, 27 Am. Rep. 55. The court said: "Banks are debtors to their customers for the amount of deposits. A check is a request of the customer to pay the whole or a portion of such indebtedness to the bearer or to the order of the payee. Until presented and accepted, it is inchoate; it vests no title or interest, legal or equitable, in the payee to the fund. Before acceptance, the drawer may withdraw his deposit; the bank owes no duty to the holder of a check until it is presented for payment. Knowledge that checks have been drawn does not render it obligatory upon the bank to retain the deposit to meet them. These rules are indispensable to the safe transaction of commercial business."

The New York Negotiable Instruments Law, 1897, art. xvii., § 325, declares: "A check of itself does not operate as an assignment of any part of the funds to the credit of the drawer with the bank, and the bank is not liable to the holder unless and until it accepts or certifies the check."

(b) **No Assignment.**—*England.*—*Schroeder v. Central Bank*, 34 L. T. N. S. 736; *Hopkinson v. Forster*, L. R. 19 Eq. 74.

United States.—*Fourth Street Bank v. Yardley*, 165 U. S. 634; *Bank of Republic v. Millard*, 10 Wall. (U. S.) 152; *Florence Min. Co. v. Brown*, 124 U. S. 385; *Bull v. Kasson Bank*, 123 U. S. 105; *Essex County Nat. Bank v. Montreal Bank*, 7 Biss. (U. S.) 195; *Christmas v. Russell*, 14 Wall. (U. S.) 84; *Mandeville v. Welch*, 5 Wheat. (U. S.) 286; *Rosenthal v. Mastin Bank*, 17 Blatchf. (U. S.) 318.

Alabama.—*National Commercial Bank v. Miller*, 77 Ala. 168, 54 Am. Rep. 50.

Arizona.—*Satterwhite v. Melcer*, (Arizona 1890) 24 Pac. Rep. 184.

Indiana.—*Harrison v. Wright*, 100 Ind. 515, 50 Am. Rep. 805; *Ofutt v. Rucker*, 2 Ind. App. 350.

Louisiana.—*Case v. Henderson*, 23 La. Ann. 49, 8 Am. Rep. 590.

Maryland.—*Moses v. Franklin Bank*, 34 Md. 574.

Massachusetts.—*Bullard v. Randall*, 1 Gray (Mass.) 605, 61 Am. Dec. 433; *Dana v. Boston Third Nat. Bank*, 13 Allen (Mass.) 445, 90 Am. Dec. 216.

Michigan.—*Grammel v. Carmer*, 55 Mich. 201, 54 Am. Rep. 363 (SHERWOOD, J., *dissenting*); *Moore v. Davis*, 57 Mich. 255.

Missouri.—*Chase v. Alexander*, 6 Mo. App. 510; *Merchants' Nat. Bank v. Coates*, 79 Mo. 168; *Dickinson v. Coates*, 79 Mo. 250, 49 Am. Rep. 228; *Coates v. Doran*, 83 Mo. 337. See *Dowell v. Vandalia Banking Assoc.*, 62 Mo. App. 482; *Bank of Commerce v. Bogy*, 44 Mo. 13. See also *infra*, this note.

New Jersey.—*Creveling v. Bloomsbury Nat. Bank*, 46 N. J. L. 255, 50 Am. Rep. 417.

New York.—*Chapman v. White*, 6 N. Y. 412, 57 Am. Dec. 464; *Dykens v. Leather Manufacturers' Bank*, 11 Paige (N. Y.) 612; *Ætna Nat. Bank v. New York Fourth Nat. Bank*, 46 N. Y. 82, 7 Am. Rep. 314; *Duncan v. Berlin*, 60 N. Y. 151; *Atty. Gen. v. Continental L. Ins. Co.*, 71 N. Y. 325, 27 Am. Rep. 55; *Risley v. Phenix Bank*, 83 N. Y. 324, 38 Am. Rep. 421; *Viets v. Union Nat. Bank*, 101 N. Y. 572, 54 Am. Rep. 743; *Lynch v. Jersey City First Nat. Bank*, 107 N. Y. 182, 1 Am. St. Rep. 803; *Union Mills First Nat. Bank v. Clark*, 134 N. Y. 368.

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Ohio.—Covert *v.* Rhodes, 48 Ohio St. 66.

Pennsylvania.—Loyd *v.* McCaffrey, 46 Pa. St. 410.

Tennessee.—Planters' Bank *v.* Keesee, 7 Heisk. (Tenn.) 200; Imboden *v.* Perrie, 13 Lea (Tenn.) 504.

The question whether or not a check operates as an equitable assignment is succinctly and clearly answered by MR. JUSTICE FIELD in the case of Florence Min. Co. *v.* Brown, 124 U. S. 385. Speaking for the court he said: "An order to pay a particular sum out of a special fund cannot be treated as an equitable assignment *pro tanto* unless accompanied with such a relinquishment of control over the sum designated that the fund holder can safely pay it, and be compelled to do so, though forbidden by the drawer. A general deposit in a bank is so much money to the depositor's credit; it is a debt to him by the bank, payable on demand to his order, not property capable of identification and specific appropriation. A check upon the bank in the usual form, not accepted or certified by its cashier to be good, does not constitute a transfer of any money to the credit of the holder; it is simply an order which may be countermanded and payment forbidden by the drawer at any time before it is actually cashed. It creates no lien on the money which the holder can enforce against the bank. It does not of itself operate as an equitable assignment."

In the case of Lunt *v.* Bank of North America, 49 Barb. (N. Y.) 221, the court held that checks drawn in the ordinary general form, not describing any particular fund or using any words of transfer of the whole or any part of the account standing to the credit of the drawer, but containing only the usual request, are of the same legal effect as inland bills of exchange, and do not amount to an assignment of the funds of the drawer before acceptance; that until then they are always revocable by the drawer. In delivering the opinion the court said: "How can it be said that these checks held by the Bank of North America are an assignment of the funds of the drawer, any more than the subsequent ones drawn before the execution of the assignment to the plaintiffs?" To the same effect are Chapman *v.* White, 6 N. Y., 412, 57 Am. Dec. 464; Harrison *v.* Wright, 100 Ind. 515, 50 Am. Rep. 805; Dana *v.* Boston Third Nat. Bank, 13 Allen (Mass.) 445, 90 Am. Dec. 216.

Where a depositor, upon discovering that he had drawn checks exceeding the amount of his deposit by several thousand dollars, notified the bank not to pay any checks that might be afterwards presented, and, finding that he could not make up the deficiency during banking hours, finally withdrew his deposit from the bank for the purpose of distributing it ratably among his check holders, it was held that the holder of a check who had presented it and demanded payment after notice to the bank not to pay, but before the deposit had been withdrawn, was not entitled to recover the amount thereof against the bank; that the drawing of a check upon a bank was not a specific appropriation of the funds of the borrower to the payment of that particular debt, in preference to the holders of checks subsequently drawn. Dykers *v.* Leather Manufacturers' Bank, 11 Paige (N. Y.) 612.

In order to constitute an equitable assignment the check must be upon a particular, specified fund. And a check in the usual form, not describing any particular fund or using any words of transfer,

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does not operate as an assignment, equitable or otherwise. *Atty. Gen. v. Continental L. Ins. Co.*, 71 N. Y. 325, 27 Am. Rep. 55.

In Missouri.—In the case of *Dickinson v. Coates*, 79 Mo. 250, 49 Am. Rep. 228, this question was finally settled in Missouri against the check holder's right to sue the bank, the reason given being that checks ordinarily do not constitute an assignment, legal or equitable, of the deposit. Prior to this decision a contrary view had been taken. *McGrade v. German Sav. Inst.*, 4 Mo. App. 330; *Zelle v. German Sav. Inst.*, 4 Mo. App. 401; *State Sav. Assoc. v. Boatmen's Sav. Bank*, 11 Mo. App. 292; *Senter v. Continental Bank*, 7 Mo. App. 532. The case of *Dickinson v. Coates*, 79 Mo. 250, 49 Am. Rep. 228, has been *approved* and *followed* in *Coates v. Doran*, 83 Mo. 337, and the law may be said to be settled in this state.

In the leading English case on this subject, *SIR G. JESSEL, MASTER OF THE ROLLS*, said: "A check is clearly not an assignment of money in the hands of a banker; it is a bill of exchange payable at a banker's. The banker is bound by his contract with his customer to honor the check when he has sufficient assets in his hands; if he does not fulfil his contract he is liable to an action by the drawer. * * * I do not understand the expressions attributed to Mr. JUSTICE BYLES in the case of *Keene v. Beard*, 8 C. B. N. S. 372, 98 E. C. L. 372; but I am quite sure that learned judge never meant to lay down that a banker who dishonors a check is liable to a suit in equity by the holder." *Hopkinson v. Forster*, L. R. 19 Eq. 74.

(c) *Double Action*.—In *Bank of Republic v. Millard*, 10 Wall. (U. S.) 152, Mr. JUSTICE DAVIS said: "It is conceded that the depositor can bring assumpsit for the breach of the contract to honor his checks, and if the holder has a similar right, then the anomaly is presented of a right of action upon one promise, for the same thing, existing in two distinct persons, at the same time." See also *Rosenthal v. Mastin Bank*, 17 Blatchf. (U. S.) 322.

But as to this contention, Mr. Daniel, in his work on *Negotiable Instruments*, vol. 2 (4th ed.), § 1639 says: "But it is again objected that if the holder could sue the bank for the amount, it would be liable to a suit from two different persons for the same thing, as the depositor could sue it also. But while the depositor could sue the bank for the wrong done in refusing to pay his check, and recover any consequential damages, he could not, we should say, sue it for the amount of the check after its presentment. For then the assignment is completed as against the bank—its assent has been obtained by its reception of the deposit, the right of the depositor parted with, and of the holder perfected. And while both depositor and holder could sue the bank, their causes of action would be as distinct as a tort is from a contract."

(d) *Splitting Cause of Action*.—*National Bank v. Eliot Bank*, 5 Am. L. Reg. 711; *Harrison v. Wright*, 100 Ind. 539, 50 Am. Rep. 805; *Dykers v. Leather Manufacturers' Bank*, 11 Paige (N. Y.) 612; *Ætna Nat. Bank v. New York Fourth Nat. Bank*, 46 N. Y. 90, 7 Am. Rep. 314.

In *Mandeville v. Welch*, 5 Wheat. (U. S.), 286, JUDGE STORY said: "A creditor shall not be permitted to split up a single cause of action into many actions, without the assent of his debtor, since it may subject him to many embarrassments and responsibilities not contemplated in his original contract. He has a right to stand upon the singleness of his original contract, and to decline any

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legal or equitable assignments by which it may be broken into fragments."

Check for Amount of Deposit.—It has been held, however, that if a check be drawn for the exact amount on deposit it will operate as an equitable assignment of the debt due from the bank to the drawer, and give the holder a right of action against the bank improperly refusing to honor the same. *Covert v. Rhodes*, 48 Ohio St. 73; *Hawes v. Blackwell*, 107 N. Car. 201, 22 Am. St. Rep. 870. Also, by implication, *Carr v. National Security Bank*, 107 Mass. 49, 9 Am. Rep. 6.

In *Kingman v. Perkins*, 105 Mass. 111, an order on a savings bank for the whole sum due, given upon sufficient consideration, was held to constitute an assignment of the amount in the hands of the savings bank.

Contra.—In *Lunt v. Bank of North America*, 49 Barb. (N. Y.) 221, it was held that checks drawn in the ordinary general form, not describing any particular fund, or using any words of transfer of the whole or any part of the account standing to the credit of the drawer in the bank upon which they are drawn, but containing only the usual request directed to the bank, to pay to the order of the payee named a certain sum of money, are of the same legal effect as inland bills of exchange, and do not amount to an assignment of the funds of the drawer in the bank. The bank on which such an instrument is drawn is not liable before acceptance, and before then the instrument is revocable by the drawer. This decision has been followed in *Atty. Gen. v. Continental L. Ins. Co.*, 71 N. Y. 330, 27 Am. Rep. 55, and in the case of *Imboden v. Perrie*, 13 Lea (Tenn.) 506. See also *Chapman v. White*, 6 N. Y. 412, 57 Am. Dec. 464. So, in *Detroit Second Nat. Bank v. Williams*, 13 Mich. 282, the check having been given in this case for the exact amount on deposit, the court said: "Without acceptance by the bank, or some special undertaking on its part, we do not think the bank could be held liable upon a check, as such, to the payee. There is no privity of contract between the payee and the drawee, and if the money is not paid upon the check, the drawee is only accountable to the drawer. The payee does not take an unaccepted check relying upon the credit of the drawee, but that of the drawer."

Check for Amount Greater than Deposit.—On the other hand, it has also been held that a check drawn for more than the amount on deposit gives the check holder no right to the actual balance. *Dana v. Boston Third Nat. Bank*, 13 Allen (Mass.) 445, 90 Am. Dec. 216; *Beauregard v. Knowlton*, 156 Mass. 395; *Coates v. Preston*, 105 Ill. 473. See also *Gibson v. Cooke*, 20 Pick. (Mass.) 15. But compare *Bromley v. Commercial Nat. Bank*, 9 Phila. (Pa.) 522.

(2) **Liability Affirmed.**—The authorities affirming the liability of the bank maintain: (a) that it is the universal custom and usage of banks to honor their customers' genuine checks when properly presented by parties entitled to receive their amount, a sufficient amount being on deposit at the time to the credit of the drawer; relying upon this custom, the customer makes his deposit and the check holder receives the check, an implied contract thereby arising between the bank and the check holder for the breach of which by the bank the check holder will be entitled to sue; (b) that a check drawn upon sufficient funds is an absolute appropriation, in effect an assignment, of the funds, to the amount of the check, in the hands of the banker, who after notice should hold the amount

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to the credit of the holder and account to him for the same; (c) that one for whose benefit a promise is made by another can maintain an action upon such promise.

The following authorities advance the foregoing grounds.

(a) **Implied Contract.**—*Illinois.*—*Munn v. Burch*, 25 Ill. 35; *Chicago M. & F. Ins. Co. v. Stanford*, 28 Ill. 168, 81 Am. Dec. 270; *Chicago Fourth Nat. Bank v. City Nat. Bank*, 68 Ill. 398.

Iowa.—*Roberts v. Corbin*, 26 Iowa 315, 96 Am. Dec. 146.

Kentucky.—*Weinstock v. Bellwood*, 12 Bush (Ky.) 139.

Louisiana.—*Vanbibber v. State Bank*, 14 La. Ann. 486, 74 Am. Dec. 442. The decision in this case was *overruled* by the court in *Case v. Henderson*, 23 La. Ann. 49, 8 Am. Rep. 590, and in *Case v. Marchand*, 23 La. Ann. 60, the last two cases being in turn *overruled* by *Gordon v. Muchler*, 34 La. Ann. 604.

Nebraska.—*Fonner v. Smith*, 31 Neb. 107, 28 Am. St. Rep. 510.

South Carolina.—*Fogarties v. State Bank*, 12 Rich. L. (S. Car.) 518, 78 Am. Dec. 468 (O'NEAL, C. J., *dissenting*); *Simmons Hardware Co. v. Greenwood Bank*, 41 S. Car. 177, 44 Am. St. Rep. 700.

Leading Case.—The case of *Munn v. Burch*, 25, Ill. 25, may be regarded as the leading case in this country which maintains this view. In delivering the opinion of the court, CATON, C. J., said: "When there is a certain well-beaten track upon any subject which the commercial public habitually follows, which business men almost or quite universally pursue, without express promise or dictation, everybody has a right to assume that all similarly situated, or in the way of that road, will pursue it. That is what is called commercial custom or usage, and enters into and forms a part of every contract to which it is applicable. These are principles of the law merchant, which have been adopted and have become a part of the common law. * * * Where a custom is so universal and of such antiquity that all men must be presumed to know it, courts will not pretend to be more ignorant than the rest of mankind, but will recognize and act upon it. * * * To say that the holder of a bank check has not both a legal and an equitable right, after presentation of the check, to the money of the drawer in the hands of the banker would destroy the most valuable feature of bank deposits and checks. Without it this whole system would become worthless and destroyed. Unless the depositor can be thus accommodated, it is worth no man's while to keep a deposit account with a bank. And no man will wish to be troubled with the check of the best drawer if he acquires no right by its presentation, and is only to receive pay upon it as a matter of favor. But we are entirely satisfied that such is not and cannot be the law. Well-recognized legal principles lead us inevitably to the same result, which commercial convenience requires. This universal custom shows us what the contract of all parties is. It shows us that the banker, when he receives the deposit, agrees with the depositor to pay it out, on the presentation of his checks, in such sums as those checks may call for, and to the person presenting them, and with the whole world he agrees that whoever shall become the owner of such check, shall, upon presentation, thereby become the owner, and entitled to receive the amount called for by the check, provided the drawer shall at that time have that amount on deposit. Who shall object to that portion of the contract which the law raises by implication on the part of the banker to the third person—to anybody and to everybody? Surely every sound

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lawyer will at once perceive a privity of contract between the banker and the holder of the check, created by the implied promise held out to the world by the banker on the one side and the receiving of the check for value and the presenting it on the other."

Mr. Daniel, in his work on *Negotiable Instruments* (4th ed.) vol. 2, § 1638, says: "The objection to the check holder's suing the bank, on the ground that there is no privity between him and the bank, seems to us utterly untenable. It is true there is no privity before the presentment of the check, but by that very act they are brought in privity and the check holder's right to sue the bank completed."

(b) **Assignment.**—*Munn v. Burch*, 25 Ill. 35, Chicago M. & F. Ins. Co. v. Stanford, 28 Ill. 168, 81 Am. Dec. 270; *Blackford v. Chicago First Nat. Bank*, 42 Ill. 238, 89 Am. Dec. 436; *Brown v. Leckie*, 43 Ill. 497; *Chicago Fourth Nat. Bank v. City Nat. Bank*, 68 Ill. 398; *Union Nat. Bank v. Oceana County Bank*, 80 Ill. 212, 22 Am. Rep. 185; *Springfield M. & F. Ins. Co. v. Peck*, 102 Ill. 265; *Ridgely Nat. Bank v. Patton*, 109 Ill. 479; *National Bank of America v. Indiana Banking Co.*, 114 Ill. 483; *Richardson v. International Bank*, 11 Ill. App. 586; *International Bank v. Jones*, 15 Ill. App. 596; *Merchants' Nat. Bank v. Ritzinger*, 20 Ill. App. 27; *International Bank v. Jones*, 20 Ill. App. 127; *Metropolitan Nat. Bank v. Jones*, 137 Ill. 634, 31 Am. St. Rep. 403; *Lester v. Given*, 8 Bush (Ky.) 357; *Weinstock v. Bellwood*, 12 Bush (Ky.) 139; *Fogarties v. State Bank*, 12 Rich. L. (S. Car.) 518, 78 Am. Dec. 468 (O'NEALL, C. J. *dissenting*); *Pease v. Landauer*, 63 Wis. 20, 53 Am. Rep. 247.

In *Lester v. Given*, 8 Bush (Ky.) 357, it was held that a check was an absolute appropriation of so much money in the hands of the bankers to the holder, to remain there until called for, and could not, after notice, be withdrawn by the drawer. And in *Pease v. Landauer*, 63 Wis. 20, 53 Am. Rep. 247, it was held that, as between the drawer and the holder of a check for value, the bank being indifferent, there was an equitable assignment of the fund to the amount of the check, the payment of which could not arbitrarily be stopped by the drawer.

(c) **Promise to One for Benefit of Another.**—*Munn v. Burch*, 25 Ill. 35; *Fogarties v. State Bank*, 12 Rich. L. (S. Car.) 518, 78 Am. Dec. 468 (O'NEALL, C. J., *dissenting*); *Roberts v. Corbin*, 26 Iowa 315, 96 Am. Dec. 146; *Fonner v. Smith*, 31 Neb. 107, 28 Am. St. Rep. 510.

In *Fogarties v. State Bank*, 12 Rich. L. (S. Car.) 518, 78 Am. Dec. 468, JOHNSTON, J., said: "It is believed to be incontrovertibly true that he for whose benefit a promise is made may maintain an action upon it, though no consideration (except in a commercial sense, as I have endeavored to explain it) pass from him to the defendant, nor any promise from the defendant to him."

So CATON, J., in *Munn v. Burch*, 25 Ill. 35, said: "It is a familiar principle of daily illustration that a promise made to the public that the performance of a particular act shall entitle the person performing the act to a particular right, is a valid assumption to such person. The promise on the one hand, and the performance on the other, create a privity between the parties as intimate and as obligatory as if the promise had originally been made to the particular person."

Same—Same—Amount Recoverable.—In those jurisdictions where the check holder is allowed to bring his action against the bank the measure of damages is usually the amount of the check wrongfully dishonored. *Munn v. Burch*, 25 Ill. 35; Chi-

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cago M. & F. Ins. Co. *v.* Stanford, 28 Ill. 168, 81 Am. Dec. 270; Bickford *v.* Chicago First Nat. Bank, 42 Ill. 238, 89 Am. Dec. 436; Brown *v.* Leckie, 43 Ill. 497; Chicago Fourth Nat. Bank *v.* City Nat. Bank, 68 Ill. 398; Union Nat. Bank *v.* Oceana County Bank, 80 Ill. 212, 22 Am. Rep. 185; Springfield M. & F. Ins. Co. *v.* Peck, 102 Ill. 265; Ridgely Nat. Bank *v.* Patton, 109 Ill. 479; National Bank of America *v.* Indiana Banking Co., 114 Ill. 483; Metropolitan Nat. Bank *v.* Jones, 137 Ill. 634, 31 Am. St. Rep. 403; Richardson *v.* International Bank, 11 Ill. App. 582; International Bank *v.* Jones, 15 Ill. App. 594. In the case of Merchants' Nat. Bank *v.* Ritzinger, 20 Ill. App. 27, the check holder was allowed to recover, in addition to the amount of the check, interest also. Weinstock *v.* Bellwood, 12 Bush (Ky.) 139; Fogarties *v.* State Bank, 12 Rich. (S. Car.) 518, 78 Am. Dec. 468.

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HALL *et al.**(Supreme Court of Alabama, Oct. 29, 1898.)*

Questions of Fact—Review.—Where a case was tried upon parole evidence, on appeal, it is the rule to indulge all reasonable presumptions in favor of the decision of the trial court upon questions of fact, and not to reverse unless it clearly appears to be erroneous.

Application of Deposits—Verbal Instructions.*—Where it appears that a note was deposited in a bank where it was payable, and where there was on deposit, at its maturity, sufficient cost to the credit of the maker to pay it; and the cashier had been instructed by the maker to appropriate such cost to the payment of the note; and that on the morning of the day it fell due, after banking hours, in the bank, the maker tendered the cashier a check on such cost in payment of the note, and was advised by the cashier that a check was unnecessary because the note had already been charged to the maker, and there was exhibited by the cashier to the maker, the note stuck on the canceling spindle and stamped "Paid" such note is, in fact, paid in money, a verbal instruction by a depositor to the cashier of a bank to apply his money on deposit in a certain way being sufficient authority.

Same—National Banks—Insolvency.*—When a national bank is insolvent, general deposits cannot be applied to the payment of a note payable at such bank; although the bank is open when the depositor orders such application of his deposits, and he is in ignorance of such insolvency.

APPEAL by plaintiff from Lauderdale county circuit court. *Reversed.*

*See notes at end of case.

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The defendants filed the following special pleas: "Second. That the note sued on in this cause was hypothecated by the Florence National Bank with the plaintiff bank as collateral security for a certificate of deposit issued by said Florence National Bank to the plaintiff. That said note in suit was made payable to and at the Florence National Bank, and was by said plaintiff, before its maturity, sent to the Florence National Bank 'for collection for account First National Bank, Cambridge, Illinois.' That said note matured on the 22d day of June, 1891, and that on the morning of said day, at the commencement of business on that day, the defendants had to their credit in said bank more than sufficient funds to meet said note, principal and interest, in full. That on the morning of said day, about the hour of nine o'clock, the defendant went to said bank, and tendered his check for the full amount of said note, but was told by the cashier of said Florence National Bank that said note had already been charged to defendant's account, and said note was exhibited to the defendant stuck on the canceling spindle and stamped 'Paid.' And the defendant alleges that the same was thereby paid, and was charged to his account, and was subsequently delivered to him. That at said time said Florence National Bank had in its vaults more than sufficient funds in currency, subject to check, to have paid said note in full. That the defendants had no knowledge or notice, until after the failure of said Florence National Bank, that said note had been transferred by said Florence National Bank to the plaintiff. Third. That the note sued on in this cause was transferred to the plaintiff bank on or about the 17th day of June, 1891, as collateral security for a certain certificate of deposit issued to the plaintiff bank. That said note in suit was made payable at the Florence National Bank, and was by said plaintiff bank, before its maturity, forwarded to the said Florence National Bank 'for collection for account First National Bank, Cambridge, Illinois.' That said note matured and became due and payable on the 22d day of June, 1891, and that on

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the morning of said day, at the time said bank opened for business, defendants had to their credit in said bank more than sufficient funds with which to pay said note in full, which said funds had been deposited for the purpose of paying said note, of which said purpose the cashier of said Florence National Bank had been advised, and instructed to so appropriate a sufficient portion of said deposit. That on the morning of said 22d day of June, 1891, shortly after the opening of the bank for business on that day, the defendant John W. Hall, one of the members of said firm of Hall & Wisdom, went to the said Florence National Bank, and tendered the cashier of the same a check on said funds deposited as aforesaid in payment of said note, but was advised by said cashier that a check was unnecessary, as said note had already been charged to the account of defendants and canceled, and said cashier exhibited to said defendant said note stuck on the canceling spindle and stamped 'Paid,' and defendant alleges that said note was paid and charged to his account, and subsequently delivered to him. That at said time the said Florence National Bank had in its vaults, in cash, subject to check, more than sufficient funds with which to have paid said note in full. That at said time defendants had no notice or knowledge that said note had been transferred to plaintiff, and were not advised of said transfer until after the failure of said bank."

Plaintiff demurred to the second plea as follows: "(1) Said plea is argumentative. (2) The facts set out in said plea do not show a payment of said note sued on. (3) That the sticking the note sued on on the canceling spindle by the cashier of the Florence National Bank did not constitute a payment or discharge thereof. (4) That the instruction by defendants to the cashier of Florence National Bank to use their funds in bank to pay the note sued on constituted said cashier the agent of said defendants, and said note would not have been paid until said agent actually applied the funds of said defendants to the payment thereof, and said plea does not show that such application was

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ever made. (5) Said plea does not state or show, as matters of fact, that said note ever was charged to the account of defendants. (6) Said plea does not state or show that the amount of said note ever was credited to the account of the plaintiff. (7) The fact that defendants had no knowledge of the transfer of said note is no defense to this suit, and does not excuse defendant from paying it in the proper manner and to the proper person. (8) Said note having been sent by plaintiff to the Florence National Bank for collection, said Florence National Bank had no authority to receive anything but money in payment thereof, and said plea does not show that any money was ever paid or tendered therefor." To the third plea the plaintiff demurred upon the following grounds: "(1) The facts in said plea do not show a payment of said note. (2) The tender of a check did not constitute a payment of said note. (3) The placing of said note on the canceling spindle did not constitute a payment thereof. (4) The facts that said note was placed on the canceling spindle, and subsequently charged to the account of defendants and delivered to them, do not constitute a payment thereof nor discharge the obligation of defendants. (5) Said plea shows that the cashier of Florence National Bank was made the agents of defendants to appropriate their funds to the payment of said note, and until said funds were so appropriated said note was not paid, and the plea does not allege or show any such appropriation. (6) Nothing but an actual payment of money by defendants or their agent to plaintiff or its agent would be a payment thereof, unless plaintiff consented to receive something else in lieu thereof, and said plea does not show any such payment or any such consent, or any discharge of the obligation of said note. (7) The facts that said note was placed on the canceling spindle, stamped 'Paid' and charged to the account of defendants, did not constitute a payment or discharge thereof, although the said Florence National Bank had sufficient funds to pay; and said plea does not show that any funds ever were applied to the payment thereof, or

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that any credit ever was entered in favor of the plaintiff, nor that the obligation of said note ever has been discharged." These demurrers being overruled, plaintiff excepted, and filed the following replications to defendants' second and third pleas: "(1) That the facts stated in said pleas are not true. (2) That the authority from the plaintiff to the Florence National Bank to collect the note in suit had been revoked before the said note was received by said Florence National Bank, and before the said 22d day of June, 1891. (3) That at the time of the maturity of said note, on the 22d day of June, 1891, and at the time of the alleged payment, said Florence National Bank was insolvent, and the use of the funds referred to in said pleas (if any funds were used) was in violation of the national banking laws, and void. (4) That at the time of the maturity of said note, on said 22d day of June, 1891, said Florence National Bank was insolvent, and not authorized to make said collection in the manner alleged. (5) That on said 22d day of June, 1891, said Florence National Bank, being a national bank under the banking laws of the United States, was in contemplation of insolvency, and had no authority, under the laws of the United States, to make any payment or do any act which would constitute a preference of one creditor over the others, or which would prevent the ratable distribution of its assets among its creditors. (6) That, at the time of and prior to the alleged payment of the note sued on, the Florence National Bank of Florence, Ala., was a national bank, organized under the laws of the United States, and was insolvent, and the said John Hall and the plaintiff had notice of such insolvency, and the statutes of the United States prohibited such bank from making the payment alleged in said pleas, and this plaintiff did not agree to or ratify the facts alleged in said plea which it is alleged paid said note. (7) That, at and prior to the time of the alleged payment of the note sued on, as the same is shown by said pleas, the Florence National Bank was a national bank organized under the laws of the United

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States known as the 'Banking Act,' and at and prior to said alleged payment was in contemplation of insolvency, and this was known to said Tice and to this plaintiff, and the alleged payment of said note was prohibited by, and in violation of, the statutes of the United States, and this plaintiff never assented, agreed to, or ratified the same. (8) That, at and prior to the alleged payment of the note sued on as alleged in said plea, the Florence National Bank of Florence, Ala., was a national bank, organized under the laws of the United States known as the 'National Banking Act,' and contemplated insolvency, and was in fact insolvent, and this was known to said Tice, who was the cashier of said Florence National Bank; and at the time of the alleged payment of said note, as shown by said pleas, said Tice, as the agent of defendants, had no authority to use the funds of said bank to pay the debt of defendants; and the said Tice, or the Florence National Bank, as the agent of plaintiff, had no authority to accept such funds in payment of the debt due to plaintiff; and the act of said Tice for himself, or as cashier of Florence National Bank, in paying the note to plaintiff, as alleged in said pleas, was in violation of the statutes of the United States, and was void, and plaintiff did not assent to or ratify the same. (9) That at and prior to the time of alleged payment of the note sued on, as shown by said pleas, the Florence National Bank was a national bank organized under the laws of the United States known as the 'National Banking Act,' and was in contemplation of insolvency, and was actually insolvent, and this was known to said Tice, who was the cashier of said bank, and to this plaintiff; and the statutes of the United States prohibited said Tice or said bank, as the agent of plaintiff, from receiving the funds of said bank in payment of the note due plaintiff, and prohibited plaintiff from receiving the same; and plaintiff did not agree to or assent to or ratify the alleged payment of said note as shown by said pleas, and was not present when the alleged facts in said pleas with regard to the alleged payment took place."

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Defendants then demurred as follows: "First. To the second replication, because said count shows on its face that authority had been delegated to the Florence National Bank to make collection of the note in suit, which authority, it is alleged, was revoked, but said count fails to allege or show that defendants had any knowledge or notice of said alleged revocation, or that the obligation in suit was not in the possession of the said bank, or that said Florence National Bank was not clothed with apparent authority to collect said note, or of any facts which would be a sufficient legal answer to said pleas. Second. To the third replication, because said count alleges that, at the time of the maturity of said note, the Florence National Bank was insolvent, but said count fails to allege that such insolvency was known to the defendants, or that they had any notice of the same, or that at the time of the maturity of said note said bank was not transacting its affairs in the regular course of business, or that the plaintiff has any legal right to raise the question sought to be raised by said count, or to invoke the act referred to. For further demurrer to said count, defendants say that the question sought to be raised by said count are questions which can only be raised by the controller of the currency, the bank examiner, or the receiver of the association. Third. To the fourth replication: For the grounds above stated last above, defendants demur to said fourth replication. Fourth. To the fifth replication, because said count alleges that the Florence National Bank was in contemplation of insolvency, but said count fails to allege or show that the defendants had any notice or knowledge of said contemplated insolvency, or that said Florence National Bank was not doing business in the regular course, or that said bank did not have apparent authority to transact business. Defendants say, for further ground, of demurrer to said count, that plaintiff cannot legally assert the law or raise the questions set out in said replication, but that they are solely for the benefit of the receiver of a national bank, and can only be raised

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through or by such receiver. Fifth. To the sixth replication, because it is not shown by said count that the Florence National Bank had ceased to do business, or that the authority to collect said note had been revoked, or that on said day it was not paying checks and transacting its business in the usual course. Sixth. To the seventh replication, because said count sets forth the conclusions of the pleader, and not the facts which constituted said contemplated insolvency; because it is not shown by said count that the defendants had knowledge or notice of the alleged contemplated insolvency of said bank; because the misuse or misapplication of the funds of said Florence National Bank by its officers, when such bank is in the condition alleged in said seventh count, is a question which can only be raised by the receiver of such bank. Seventh. To the eighth replication, because it does not show that the defendants had notice or knowledge of said insolvency so as to impute bad faith to them, or either of them, or that they, or either of them, had actual notice or knowledge of said alleged insolvency or contemplated insolvency. For further ground of demurrer to said count, defendants say that the misuse of the funds of said bank, or the misapplication of said funds as alleged in said count, is a question which can only be raised by the receiver of said bank, or such party as is legally appointed custodian of its assets, and cannot be asserted or raised by the plaintiff. Eighth. To the ninth count, because it does not show that defendants had any knowledge or notice of the alleged insolvency, or contemplated insolvency, of the Florence National Bank, or that the agency of said bank as a collecting agent for said plaintiff had been revoked or annulled, or that said bank was not on said day paying checks and transacting business in the usual course, or that plaintiff has any legal right to raise the question or invoke the law referred to in said count, such being only for the receiver of such bank." These demurrers being sustained, plaintiff excepted.

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Simpson & Jones, for appellant.

C. E. Jordan, Paul Hodges, and *E. C. Crow*, for appellees.

COLEMAN, J. The appellant, plaintiff in the court below, sued John W. Hall and H. P. Wisdom upon their commercial promissory note, payable at the Florence National Bank. Florence, Ala., received by plaintiff in due course of trade, for a valuable consideration before maturity, and without notice of any defense. The case was tried by the court without a jury, upon defendants' special pleas of payment numbered 2 and 3, and judgment rendered for the defendants. There was a demurrer to each of these pleas, which was overruled by the court, and then replication by plaintiff, to which replication the court sustained a demurrer. The rulings of the court upon the several demurrers, and the judgment upon the evidence, upon issue joined, are assigned as error. When a case is tried by the court upon parol evidence, the rule which prevails in this state "requires us to indulge all reasonable presumptions in favor of the decision of the court upon questions of fact, and not to reverse it, unless clearly satisfied that it is wrong." *Jones v. White*, 112 Ala. 449, 20 South. 527; *Woodrow v. Hawving*, 105 Ala. 240, 16 South. 720. The testimony of the witness Hall, and of Tice, the cashier of the Florence National Bank, sustain the averments of facts set up in the special plea No. 3 as constituting payment; and, although the testimony offered by plaintiff is in direct conflict with the testimony of defendants upon these facts, under the rule stated we would not be justified in reversing the judgment on account of the conclusion arrived at by the court from the facts. The only questions left open for consideration are those arising from the rulings of the court upon the demurrer to the special pleas, and to the replications to these pleas.

We deem it unnecessary to consider these questions relative to special plea No. 2. The first count of the

Case Stated.

Questions of Fact
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complaint and this plea describe the note sued upon as payable to the Florence National Bank. The evidence is conclusive that there was no such note, and the note sued upon and offered in evidence was payable to Hall & Wisdom, a partnership, and was payable at the Florence National Bank. This plea was not sustained.

The third special plea includes every legal proposition involved in the second plea, and, in connection with the second count of the complaint, presents the merits of both sides to the case.

The pleadings show that John W. Hall and H. P. Wisdom, the defendants and makers of the note, composed the partnership of Hall & Wisdom, to whom the note was made payable, and by whom it was indorsed in blank; that the note was payable at the Florence National Bank on the 22d of June, where the note was on that day for collection for account of plaintiff; that on that day, and prior, there was on deposit in the bank, to the credit of the partnership of Hall & Wisdom, more than sufficient to pay said note, and the cashier had been advised that the money was deposited for the purpose of paying the note, and instructed to so appropriate it, and there was a sufficient amount of cash in the bank at the time for this purpose; that Hall, a member of the firm, on the morning of the 22d, after banking hours, in the bank, tendered the cashier a check on the funds on deposit in payment of the note, and was advised by the cashier that a check was unnecessary and that the note had already been charged to defendants, and exhibited to him the note canceled and stamped "Paid." We are of opinion that these facts constitute a payment in money, and do not raise the question argued, that an agent has no authority to receive a check in payment of a debt or anything else than money. It is true that the plea does not aver, as a fact, that the note at the time had been charged to defendants, nor that the amount had been credited to plaintiff, or was ever remitted or credited to plaintiff's account; nor, in our opinion, could defendants be held responsible if these proper entries

Application of Deposits—Verbal Instructions.

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were ever made by the officers of the bank. Suppose, under the facts, after canceling and stamping the note "Paid," it had been handed to defendants instead of sticking it on the canceling spindle, for future entry by the proper officer, could there be any doubt of a valid payment? To hold otherwise would require the parties to go through the needless process of having the money counted out to defendants, and the defendants then handing back to the cashier the money, with instructions to apply it to the note. A verbal instruction by a depositor to a cashier to apply his money on deposit in a certain way is sufficient authority. A check might furnish more complete and satisfactory evidence of the authority, but a check is not necessary to confer the authority. If no money had in fact been deposited to meet the note, and defendants, on the morning of the maturity of the note, had gone to the bank with the money, and paid it over to the cashier in payment, and the note had been surrendered to him, stamped "Paid," there could be no controversy as to the question of payment, whether such entry was ever made on the books of the bank or not. Can there be any difference in principle when a depositor who has money in the bank to meet his note, and has so informed the cashier, and instructed him to apply it to the debt, and on the day it falls due tenders to the cashier a check on the funds which are then in bank subject to check, to pay the debt, and is informed that the check is unnecessary, and that the note has been paid, and exhibits the note stamped "Paid," and hanging on the canceling spindle to be entered by the bookkeeper? We think not, and it can make no difference, in legal effect, that during the same day, and before the proper entries are made, the bank suspends payment and is closed. The latter proposition, however, is involved in the replication, to which we will briefly refer.

Section 5242 of the Revised Statutes of the United States reads as follows: "All transfers of the notes,

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bonds, bills of exchange, or other evidences of debt owing to any national banking association, or of deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another except in payment of its circulating notes, shall be utterly null and void; and no attachment, injunction or execution, shall be issued against such association or its property before final judgment in any suit, action, or proceeding, in any state, county, or municipal court."

Same—National
Banks—Insol-
vency.

It is the opinion of the court that the facts set up in the plea under consideration, independent of the statute just cited, show a payment of the note, but that the statute is prohibitory and peremptory, and that a legal payment could not be made out of moneys deposited to his general credit, after insolvency of the bank, or in contemplation of insolvency, and that there was no legal payment of the note. It is the opinion of the court that Hall's ignorance of the financial condition of the bank, or that it contemplated insolvency, made no difference as to the legality and invalidity of the intended payment. *Bank v. Butler*, 129 U. S. 223, 9 Sup. Ct. 281. The court, therefore, holds that the replication presented a complete answer to the plea, and that the trial court improperly sustained the demurrer.

The writer is of opinion that if Hall, in ignorance of the condition of the bank, in the usual course of business, deposited the money in bank to his credit, and on Saturday preceding the Monday gave instructions to the cashier to so apply it, and he further deposited other money on the morning of the closing of the bank, and went to the bank while it was doing business as usual

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to pay the note, and was informed by the cashier that the money had been so applied, and exhibited the note canceled and stamped "Paid," and it was subsequently so entered up under the directions of the receiver, and the note surrendered to Hall, that the payment was valid, at least as to the plaintiff, whatever may be the rights of the receiver in the premises. The effect of the payment by Hall thus made to the Florence National Bank, authorized by plaintiff, to collect for plaintiff, was to transfer the deposit from the credit of Hall & Wisdom to the credit of the plaintiff, to whose credit in law it stood when the bank closed its doors, as much so as if the credit had been formerly entered at the time. Under the view taken by the court, the case must be reversed and remanded. Reversed and remanded.

COLEMAN, J., dissented. BRICKELL, C. J., concurred with COLEMAN, J.

NOTES.

Verbal Transfer of Deposit.—Deposits, ordinarily transferable by check or draft, may be transferred by parol. *McEwen v. Davis*, 39 Ind. 109. See *Neff v. Greene County Nat. Bank*, 89 Mo. 581.

National Banks—Transfer of Deposit after Insolvency—Knowledge.—To make transfers, assignments, deposits and payments void, under the National Bank act, it is only necessary that the insolvency should be in the contemplation of the bank making the transfers, etc., and not that it should also be known to or contemplated by the party to whom they are made. *Case v. Citizens' Bank*, 2 Woods (U. S.) 23, 1 Nat. Bank Cas. 276. But compare *Roberts v. Hill*, 24 Fed. Rep. 571.

MERRILL

71.

NATIONAL BANK OF JACKSONVILLE (two cases).

(*Supreme Court of the United States, February 20, 1899.*)

7 **Right of Appeal.**—A decree of a circuit court was reversed by the circuit court of appeals in a decree containing specific directions, and the circuit court entered a decree in conformity with such direc-

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tions; and an appeal therefrom was prayed to the circuit court of appeals, which was dismissed. The second decree of the circuit court was entered before an appeal from the first decree of the circuit court of appeals was presented to the supreme court. *Held*, that this promptness of action did not cut off such appeal to the supreme court, and any difficulty on the part of the supreme court in dealing with the cause in the circuit court was obviated by an appeal from the action of the circuit court of appeals in dismissing an appeal from the second decree of the circuit court, which brought before the supreme court the record subsequent to the first decree of the circuit court of appeals.

Insolvent National Bank—Dividends—Equity Jurisdiction.—In a suit by a creditor of an insolvent national bank against its receiver, where the controversy involved the question on what basis dividends should have been declared, and therein the enforcement of the administration of the trust in accordance with law, the contention that the bill should be dismissed because of adequate remedy at law was without merit.

Same—Same—Laches—Estoppel.—Less than two years had elapsed from the payment of the first dividend to the filing of such bill, and the other creditors had not been harmed by complainant's temporary submission to the ruling of the comptroller of the currency requiring complainant to first exhaust the collaterals securing its debt, and then to prove for the balance due, after applying the proceeds of the collaterals in part payment; and the decree under such ruling affected only assets on hand, or such as might be subsequently discovered. *Held*, that the lapse of time was not such as to raise any presumption of laches, nor was complainant estopped to urge the invalidity of such ruling.

Same—Same—Secured Creditors—Bankruptcy Rule.*—A secured creditor of an insolvent national bank may prove and receive dividends upon the face of his claim as it stood at the time of the declaration of insolvency, without crediting either his collaterals, or collections made therefrom after such declaration, subject only to the proviso that dividends must cease when from them and from collaterals realized, the claim has been paid in full, the legislation in respect to the administration of national banks not requiring the application of the bankruptcy rule in such cases.

MR. JUSTICE WHITE, MR. JUSTICE HARLAN, MR. JUSTICE MCKENNA, and MR. JUSTICE GRAY dissenting.

APPEAL by receiver from the Circuit Court of Appeals of the United States for the Fifth Circuit. *Affirmed*.

On the 17th day of July, A. D. 1891, the First National Bank of Palatka, Fla., a banking association

*See *Citizens' Bank of Mound City et al. v. State ex rel. Attorney General et al.* (Kan.), *ante*, p. 85 and notes, p. 88.

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incorporated under the laws of the United States, having its place of business at Palatka, Fla.,
Case Stated. failed, and closed its doors. Subsequently, T. B. Merrill was duly appointed receiver of the bank by the comptroller of the currency, and entered upon the discharge of his duties. At the time of the failure of the bank, it was indebted to the National Bank of Jacksonville in the sum of \$6,010.47, on sundry drafts, which indebtedness was unsecured, and also in the sum of \$10,093.34, being \$10,000, and interest, for money borrowed June 5, 1891, evidenced by a certificate of deposit, which was secured by sundry notes belonging to the First National Bank of Palatka, attached to the certificate as collateral. These notes aggregated \$10,896.22, the largest being a note of A. L. Hart for \$5,350.22. The National Bank of Jacksonville proved its claim upon the unsecured drafts for \$6,010.47, and as to this there was no controversy. It also offered to prove its claim for \$10,093.34, but the receiver would not permit it to do this; and, under the ruling of the comptroller of the currency, it was ordered first to exhaust the collaterals given to secure the certificate of deposit, and then to prove for the balance due, after applying the proceeds of the collaterals in part payment.

The Jacksonville Bank collected all the notes, excepting that of A. L. Hart, obtained a judgment on the latter, which it assigned and transferred to the receiver, applied the proceeds of the collaterals which it had collected to its claim on the certificate, and proved for the balance due thereon, being the sum of \$4,496.44. On December 1, 1892, a dividend of \$1,573.75 was paid on the claim as thus proven; and on May 17, 1893, a second dividend of \$449.64 was paid.

On the 11th of September, 1894, the Jacksonville Bank filed its bill of complaint in the circuit court of the United States for the Southern district of Florida against Merrill, as a receiver, which set forth the foregoing facts, complained of the action of the receiver in not permitting proof for the full amount of the

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certificate of deposit, and alleged that it "gave due notice that it would demand a *pro rata* dividend upon the whole amount due your orator, without deducting the amount collected on collateral security, to wit, that it would demand a *pro rata* dividend upon \$16,103.81, and interest thereon from the 17th day of July, A. D. 1891."

The prayer of the bill was, among other things, for a *pro rata* distribution on the entire amount of the indebtedness.

The defendant demurred to the bill, and the demurrer having been overruled, answered, denying "that the complainant gave due notice that it would demand a *pro rata* dividend upon the whole amount due to it without deducting the amount collected on collateral security," and averring, to the contrary, that "the complainant accepted the said ruling of the said comptroller without demurrer, and accepted from the said comptroller through this defendant, without protesting notice of any kind, the checks of the said comptroller in payment of the dividends mentioned in the bill, and that it was not until the 15th of March, 1894, that the complainant gave notice of any kind that it dissented from the said ruling of the comptroller, and would demand payment upon a different basis."

Sundry exceptions were taken to the answer, which were overruled, and the cause was set down for final hearing on bill and answer.

The circuit court entered its decree January 29, 1896, that complainant was entitled to receive dividends on the whole face of the indebtedness due July 17, 1891, less the dividends actually paid to it; that the receiver declare the dividend on the basis of the whole claim, and pay it out of any assets which were in his hands March 15, 1894; and that he render an account.

From this decree the receiver prosecuted an appeal to the circuit court of appeals for the Fifth circuit. That court, differing from the circuit court as to the form of its decree, reversed it, and remanded the cause, with directions to enter a decree that the Jacksonville

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Bank was entitled to prove its claims to the entire amount of the indebtedness, and to the payment thereon of the same dividends as had been paid on other indebtedness of the Palatka Bank, with interest on such dividends from the date of the declaration thereof, less a credit of the sums which had been paid as dividends on the part of the claim theretofore allowed, provided the dividends theretofore paid and thereafter to be paid on the sum of \$10,093.34, together with the amounts theretofore and thereafter received on the collaterals securing that indebtedness, should not exceed 100 cents on the dollar of the principal and interest of said debt; that the receiver recognizes the Jacksonville Bank as creditor of the Palatka Bank in said sum of \$10,093.34 as of July 17, 1891, and pay dividends as aforesaid thereon, or certify the same to the comptroller of the currency, to be paid in due course of administration; and that the Jacksonville Bank receive, before further payment to other creditors, its due proportion of the dividends as thus declared, with interest. 41 U. S. App. 529, 21 C. C. A. 282, and 75 Fed. 148. From that decree, after the mandate of the circuit court of appeals had been sent down to the circuit court, and proceedings had thereunder, an appeal was taken and perfected to this court, and is numbered 54 of this term.

The decree was entered by the circuit court in pursuance of the mandate of the circuit court of appeals, July 27, 1896; and the receiver prayed an appeal therefrom to the circuit court of appeals, which was by that court dismissed, on motion of the Jacksonville Bank. 41 U. S. App. 645, 24 C. C. A. 63, and 78 Fed. 208. From this decree of dismissal, an appeal was allowed and perfected to this court, and is numbered 55 of this term.

These appeals were argued together.

Edward Winslow Paige and *F. F. Oldham*, for appellant.

J. C. Cooper, *Wm. Worthington*, and *Geo. H. Yeamans*, for appellee.

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MR CHIEF JUSTICE FULLER, after stating the facts in the foregoing language, delivered the opinion of the court.

The circuit court of appeals reversed the decree of the circuit court with specific directions. Nothing remained for the circuit court to do except to enter a decree in accordance with the mandate; and, for the purposes of an appeal to this court, the decree of the circuit court of appeals was final. The mandate went down, and the circuit court entered its decree in strict conformity therewith before the appeal in No. 54 was prosecuted to this court. This promptness of action did not, however, cut off that appeal, and any difficulty in our dealing with the cause in the circuit court was obviated by the second appeal, which brings before us, in No. 55, the record subsequent to the first decree of the circuit court of appeals.

It is contended that the bill should have been dismissed because of adequate remedy at law, and on the ground of laches and estoppel. As the controversy involved the question on what basis dividends should have been declared, and therein the enforcement of the administration of the trust in accordance with law, we have no doubt of the jurisdiction in equity.

Nor was the lapse of time such as to raise any presumption of laches, nor could an estoppel properly be held to have arisen. Less than two years had elapsed from the payment of the first dividend to the filing of the bill, and the other creditors of the insolvent bank had not been harmed by the temporary submission of complainant to the ruling of the comptroller. The decree affected only assets on hand or such as might be subsequently discovered; and, if the other creditors had no rights superior to that of complainant, they lost nothing by the reduction of their dividends, if any afterwards declared to be paid out of such assets.

The inquiry on the merits is, generally speaking, whether a secured creditor of an insolvent national bank

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Same—Same—
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may prove and receive dividends upon the face of his claim as it stood at the time of the declaration of insolvency, without crediting either his collaterals, or collections made therefrom after such declaration, subject always to the *proviso* that dividends must cease when, from them and from collaterals realized, the claim has been paid in full.

Counsel agree that four different rules have been applied in the distribution of insolvent estates, and state them as follows:

"Rule 1. The creditor desiring to participate in the fund is required first to exhaust his security, and credit the proceeds on his claim, or to credit its value upon his claim, and prove for the balance, it being optional with him to surrender his security and prove for his full claim.

"Rule 2. The creditor can prove for the full amount, but shall receive dividends only on the amount due him at the time of distribution of the fund; that is, he is required to credit on his claim, as proved, all sums received from his security, and may receive dividends only on the balance due him.

"Rule 3. The creditor shall be allowed to prove for, and receive dividends upon, the amount due him at the time of proving or sending in his claim to the official liquidator, being required to credit as payments all the sums received from his security prior thereto.

"Rule 4. The creditor can prove for, and receive dividends upon, the full amount of his claim, regardless of any sums received from his collateral after the transfer of the assets from the debtor in insolvency, provided that he shall not receive more than the full amount due him."

The circuit court and the circuit court of appeals held the fourth rule applicable, and decreed accordingly.

This was in accordance with the decision of the circuit court of appeals for the Sixth circuit, in *Bank v. Armstrong*, 16 U. S. App. 465, 8 C. C. A. 155, and 59 Fed. 372, MR. JUSTICE BROWN, and Circuit Judges

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TAFT and LURTON, composing the court. The opinion was delivered by JUDGE TAFT and discusses the question on principle with a full citation of the authorities. We concur with that court in the proposition that assets of an insolvent debtor are held under insolvency proceedings in trust for the benefit of all his creditors, and that a creditor, on proof of his claim, acquires a vested interest in the trust fund; and, this being so, that the second rule before mentioned must be rejected, as it is based on the denial, in effect, of a vested interest in the trust fund, and concedes to the creditor simply a right to share in the distributions made from that fund according to the amount which may then be due him, requiring a readjustment of the basis of distribution at the time of declaring every dividend, and treating, erroneously as we think, the claim of the creditor to share in the assets of the debtor, and his debt against the debtor, as if they were one and the same thing.

The third and fourth rules concur in holding that the creditor's right to dividends is to be determined by the amount due him at the time his interest in the assets becomes vested, and is not subject to subsequent change, but they differ as to the point of time when this occurs.

In Kellock's Case, L. R. 3 Ch. 769, it was held that the creditor's interest in the general fund to be distributed vested at the date of presenting or proving his claim; and this rule has been followed in many jurisdictions where statutory provisions have been construed to require an affirmative election to become a beneficiary thereunder. For instance, the cases in Illinois construing the assignment act of the state, which are well considered and full to the point, hold that the interest of each creditor in the assigned estate "only vests in him when he signifies his assent to the assignment by filing his claim with the assignee." *Levy v. Bank*, 158 Ill. 88, 42 N. E. 129; *Furness v. Bank*, 147 Ill. 570, 35 N. E. 624.

On the other hand, the supreme court of Pennsylvania, in *Miller's Appeal*, 35 Pa. St. 481, and many subsequent cases, has held, necessarily in view of the stat-

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utes of Pennsylvania regulating the matter, that the interest vests at the time of the transfer of the assets in trust. In that case the debtor executed a general assignment for the benefit of creditors. Subsequently, the assignor became entitled to a legacy which was attached by a creditor, who realized therefrom \$2,402.87. It was held that such creditor was, notwithstanding, entitled to a dividend out of the assigned estate on the full amount of his claim at the time of the execution of the assignment. MR. JUSTICE STRONG, then a member of the state tribunal, said: "By the deed of assignment, the equitable ownership of all the assigned property passed to the creditors. They became joint proprietors, and each creditor owned such a proportional part of the whole as the debt due to him was of the aggregate of the debts. The extent of his interest was fixed by the deed of trust. It was, indeed, only equitable; but, whatever it was, he took it under the deed, and it was only as a part owner that he had any standing in court when the distribution came to be made. * * * It amounts to very little to argue that Miller's recovery of the \$2,402.87 operated with precisely the same effect as if a voluntary payment had been made by the assignor after his assignment; that is, that it extinguished the debt to the amount recovered. No doubt it did, but it is not as a creditor that he is entitled to a distributive share of the trust fund. His rights are those of an owner by virtue of the deed of assignment. The amount of the debt due to him is important only so far as it determines the extent of his ownership. The reduction of that debt, therefore, after the creation of the trust, and after his ownership had become vested, it would seem, must be immaterial."

Differences in the language of voluntary assignments and of statutory provisions naturally lead to particular differences in decision, but the principle on which the third and fourth rules rest is the same. In other words, those rules hold, together with the first rule, that the creditor's right to dividends is based on the amount of his claims at the time his interest in the assets vests by

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the statute, or deed of trust, or rule of law, under which they are to be administered.

The first rule is commonly known as the "bankruptcy rule," because enforced by the bankruptcy courts in the exercise of their peculiar jurisdiction, under the bankruptcy acts, over the property of the bankrupt, in virtue of which creditors holding mortgages or liens thereon might be required to realize on their securities, to permit them to be sold, to take them on valuation, or to surrender them altogether, as a condition of proving against the general assets.

The fourth rule is that ordinarily laid down by the chancery courts, to the effect that, as the trust created by the transfer of the assets by operation of law or otherwise is a trust for all creditors, no creditor can equitably be compelled to surrender any other vested right he has in the assets of his debtor in order to obtain his vested right under the trust. It is true that, in equity, a creditor having a lien upon two funds may be required to exhaust one of them in aid of creditors who can only resort to the other; but this will not be done when it trenches on the rights or operates to the prejudice of the party entitled to the double fund. Story, Eq. Jur. (13th Ed.) § 633; *In re Bates*, 118 Ill. 524, 9 N. E. 257. And it is well established that in marshaling assets, as respects creditors, no part of his security can be taken from a secured creditor until he is completely satisfied. 2 White & T. Lead. Cas. Eq. (4th Am. Ed.) pt. 1, pp. 258, 322.

In *Greenwood v. Taylor*, 1 Russ. & M. 185, SIR JOHN LEACH applied the bankruptcy rule in the administration of a decedent's estate, and remarked that the rule was "not founded, as has been argued, upon the peculiar jurisdiction in bankruptcy, but rests upon the general principles of a court of equity in the administration of assets," and referred to the doctrine requiring a creditor having two funds as security, one of which he shares with others, to resort to his sole security first. But *Greenwood v. Taylor* was, in effect, overruled by LORD COTTENHAM in *Mason v. Bogg*, 2 Mylne & C. 443, 448,

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and expressly so by the court of appeal in chancery in Kellock's Case ; and the application of the bankruptcy rule rejected.

In Kellock's Case, LORD JUSTICE W. PAGE WOOD (soon afterwards LORD CHANCELLOR HATHERLY) said:

"Now, in the case of proceedings with reference to the administration of the estates of deceased persons, LORD COTTENHAM put the point very clearly and said : 'A mortgagee has a double security. He has a right to proceed against both, and to make the best he can of both. Why he should be deprived of this right because the debtor dies, and dies insolvent, it is not very easy to see.'

"Mr. De Gex, who argued this case, very ably, says that the whole case is altered by the insolvency. But where do we find such a rule established, and on what principle can such a rule be founded, as that, where a mortgagor is insolvent, the contract between him and his mortgagee is to be treated as altered in a way prejudicial to the mortgagee, and that the mortgagee is bound to realize his security before proceeding with his personal demand ?

"It was strongly pressed upon us, and the argument succeeded before SIR J. LEACH in *Greenwood v. Taylor*, that the practice in bankruptcy furnishes a precedent which ought to be followed. But the answer to that is that this court is not to depart from its own established practice, and vary the nature of the contract between mortgagor and mortgagee by analogy to a rule which has been adopted by a court having a peculiar jurisdiction, established for administering the property of traders unable to meet their engagements, which property that court found it proper and right to distribute in a particular manner, different from the mode in which it would have been dealt with in the court of chancery. * * * We are asked to alter the contract between the parties by depriving the secured creditor of one of his remedies, namely, the right of standing upon his securities until they are redeemed."

And it was the established rule in England prior to

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the judicature act (38 & 39 Vict. c. 77) that in an administration suit a mortgagee might prove his whole debt, and afterwards realize his security for the difference; and so as to creditors with security, where a company was being wound up under the companies act of 1862. 1 Daniell, Ch. Prac. 384; *In re* Brick Works, Ch. Div. 337.

Certainly, the giving of collateral does not operate of itself as a payment or satisfaction either of the debt or any part of it, and the debtor, who has given collateral security, remains debtor, notwithstanding, to the full amount of the debt; and so in *Lewis v. U. S.*, 92 U. S. 623, it was ruled that "it is a settled principle of equity that a creditor holding collaterals is not bound to apply them before enforcing his direct remedies against the debtor."

Doubtless, the title to collaterals pledged for the security of a debt vests in the pledgee so far as necessary to accomplish that purpose, but the obligation to which the collaterals are subsidiary remains the same. The creditor can sue, recover judgment, and collect from the debtor's general property, and apply the proceeds of the collateral to any balance which may remain. Insolvency proceedings shift the creditor's remedy to the interest in the assets. As between debtor and creditor, moneys received on collaterals are applicable by way of payment; but as, under the equity rule, the creditor's rights in the trust fund are established when the fund is created, collections subsequently made from, or payments subsequently made on, collateral, cannot operate to change the relations between the creditor and his co-creditors in respect of their rights in the fund.

As JUDGE TAFT points out, it is because of the distinction between the right in *personam* and the right in *rem* that interest is only added up to the date of insolvency, although, after the claims as allowed are paid in full, interest accruing may then be paid before distribution to stockholders.

In short, the secured creditor is not to be cut off

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from his right in the common fund because he has taken security which his co-creditors have not. Of course, he cannot go beyond payment, and surplus assets or so much of his dividends as are unnecessary to pay him must be applied to the benefit of the other creditors; and, while the unsecured creditors are entitled to be substituted as far as possible to the rights of secured creditors, the latter are entitled to retain their securities until the indebtedness due them is extinguished.

The contractual relations between borrower and lender, pledging collaterals, remain, as is said by the New York court of appeals in *People v. Remington*, 121 N. Y. 328, 24 N. E. 793, "unchanged, although insolvency has brought the general estate of the debtor within the jurisdiction of a court of equity for administration and settlement." The creditor looks to the debtor to repay the money borrowed, and to the collateral to accomplish this in whole or in part; and he cannot be deprived either of what his debtor's general ability to pay may yield, or of the particular security he has taken."

We cannot concur in the view expressed by CHIEF JUSTICE PARKER in *Amory v. Francis* (1820) 16 Mass. 308, that "the property pledged is in fact security for no more of the debt than its value will amount to, and for all the rest the creditor relies upon the personal credit of his debtor, in the same manner he would for the whole if no security were taken."

We think the collateral is security for the whole debt and every part of it, and is as applicable to any balance that remains after payment from other sources as to the original amount due, and that the assumption is unreasonable that the creditor does not rely on the responsibility of his debtor according to his promise.

The ruling in *Amory v. Francis* was disapproved, shortly after it was made, by the supreme court of New Hampshire, in *Moses v. Ranlet* (1822) 2 N. H. 488, WOODBURY, J. (afterwards MR. JUSTICE WOODBURY, of this court), delivering the opinion, and is rejected

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by the preponderance of decisions in this country, which sustain this conclusion that a creditor, with collateral, is not on that account to be deprived of the right to prove for his full claim against an insolvent estate. Many of the cases are referred to in *Bank v. Armstrong*, and these and others given in 3 Am. & Eng. Enc. Law (2d Ed.) p. 141.

Does the legislation in respect to the administration of national banks require the application of the bankruptcy rule? If not, we are of opinion that the equity rule was properly applied in this case.

By section 5234 of the Revised Statutes, and section 1 of the act of June 30, 1876 (19 Stat. 63, c. 156), the comptroller of the currency is authorized to appoint a receiver to close up the affairs of a national banking association when it has failed to redeem its circulation notes, when presented for payment; or has been dissolved, and its charter forfeited; or has allowed a judgment to remain against it unpaid for 30 days; or whenever the comptroller shall have become satisfied of its insolvency after examining its affairs. Such receiver is to take possession of its effects, liquidate its assets, and pay the money derived therefrom to the treasurer of the United States.

Section 5235 of the Revised Statutes requires the comptroller, after appointing such receiver, to give notice by newspaper advertisement for three consecutive months, "calling on all persons who may have claims against such association to present the same, and to make legal proof thereof."

By section 5242, transfers of its property by a national banking association after the commission of an act of insolvency, or in contemplation thereof, to prevent distribution of its assets in the manner provided by the chapter of which that section forms a part, or with a view to preferring any creditor except in payment of its circulating notes, are declared to be null and void.

Section 5236 is as follows:

"From time to time, after full provision has first been made for refunding to the United States any defi-

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ciency in redeeming the notes of such association, the comptroller shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction, or adjudicated in a court of competent jurisdiction, and, as the proceeds of the assets of such association are paid over to him, shall make further dividends on all claims previously proved or adjudicated; and the remainder of the proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held."

In *Cook County Nat. Bank v. U. S.*, 107 U. S. 445, 2 Sup. Ct., 561, it was ruled that the statute furnishes a complete code for the distribution of the effects of an insolvent national bank; that its provisions are not to be departed from; and that the bankrupt law does not govern distribution thereunder. The question now before us was not treated as involved, and was not decided, but the case is in harmony with *Bank v. Colby*, 21 Wall. 609, and *Scott v. Armstrong*, 146 U. S. 499, 13 Sup. Ct. 148, which proceed on the view that all rights, legal or equitable, existing at the time of the commission of the act of insolvency which led to the appointment of the receiver, other than those created by preference forbidden by section 5242, are preserved, and that no additional right can thereafter be created, either by voluntary or involuntary proceedings. The distribution is to be "ratable" on the claims as proved or adjudicated; that is, on one rule of proportion applicable to all alike. In order to be "ratable," the claims must manifestly be estimated as of the same point of time, and that date has been adjudged to be the date of the declaration of insolvency. *White v. Knox*, 111 U. S. 784, 4 Sup. Ct. 686. In that case it appeared that the Miners' National Bank had been put in the hands of a receiver by the comptroller of the currency, December 20, 1875. White presented a claim for \$60,000, which the comptroller refused to allow. White then brought suit to have his claim adjudicated, and on June 23,

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1883, recovered judgment for \$104,523.72, being the amount of his claim, with interest to the date of the judgment. Meanwhile the comptroller had paid the other creditors ratable dividends, aggregating 65 per cent. of the amounts due them, respectively, as of the date when the bank failed. When White's claim was adjudicated, the comptroller calculated the amount due him according to the judgment as of the date of the failure, and paid him 65 per cent. on that amount. White admitted that he had received all that was due him on the basis of distribution assumed by the comptroller, but claimed that he was entitled to have his dividends calculated on the face of the judgment, which would give him several thousand dollars more than he had received, and he applied for a *mandamus* to compel the payment to him of the additional sum. The writ was refused by the court below, and its judgment was affirmed. MR. CHIEF JUSTICE WAITE, speaking for the court, said: "Dividends are to be paid to all creditors, ratably; that is to say, proportionally. To be proportionate, they must be made by some uniform rule. They are to be paid on all claims against the bank previously proved and adjudicated. All creditors are to be treated alike. The claim against the bank, therefore, must necessarily be made the basis of the apportionment. * * * The business of the bank must stop when insolvency is declared. Rev. St. § 5228. No new debt can be made after that. The only claims the comptroller can recognize in the settlement of the affairs of the bank are those which are shown by proof satisfactory to him, or by the adjudication of a competent court, to have had their origin in something done before the insolvency. It is clearly his duty, therefore, in paying dividends, to take the value of the claim at that time as the basis of distribution."

In *Scott v. Armstrong*, 146 U. S. 499, 13 Sup. Ct. 148, it was argued that the ordinary equity rule of set-off in case of insolvency did not apply to insolvent national banks, in view of sections 5234, 5236, and 5242

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of the Revised Statutes. It was urged "that these sections, by implication, forbid this set-off, because they require that, after the redemption of the circulating notes has been fully provided for, the assets shall be ratably distributed among the creditors, and that no preferences given or suffered, in contemplation of or after committing the act of insolvency, shall stand"; and "that the assets of the bank existing at the time of the act of insolvency include all its property, without regard to any existing liens thereon or set-offs thereto." But this court said: "We do not regard this position as tenable. Undoubtedly, any disposition by a national bank, being insolvent or in contemplation of insolvency, of its choses in action, securities, or other assets, made to prevent their application to the payment of its circulating notes, or to prefer one creditor to another, is forbidden; but liens, equities, or rights arising by express agreement, or implied from the nature of the dealings between the parties, or by operation of law, prior to insolvency, and not in contemplation thereof, are not invalidated. The provisions of the act are not directed against all liens, securities, pledges, or equities, whereby one creditor may obtain a greater payment than another, but against those given or arising after or in contemplation of insolvency. Where a set-off is otherwise valid, it is not perceived how its allowance can be considered a preference, and it is clear that it is only the balance, if any, after the set-off is deducted, which can justly be held to form part of the assets of the insolvent. The requirement as to ratable dividends is to make them from what belongs to the bank, and that which at the time of the insolvency belongs of right to the debtor does not belong to the bank."

The set-off took effect as of the date of the declaration of insolvency, but outstanding collaterals are not payment, and the statute does not make their surrender a condition to the receipt by the creditor of his share in the assets.

The rule in bankruptcy went upon the principle

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of election; that is to say, the secured creditor "was not allowed to prove his whole debt, unless he gave up any security held by him on the estate against which he sought to prove. He might realize his security himself if he had power to do so, or he might apply to have it realized by the court of bankruptcy, or by some other court having competent jurisdiction, and might prove for any deficiency of the proceeds to satisfy his demand; but if he neglected to do this, and proved for his whole debt, he was bound to give up his security." Rob. Bankr. 336. But it was only under bankrupt laws that such election could be compelled. *Taylor v. Thompson*, 5 Pet. 358, 369.

And we are unable to accept the suggestion that compulsion under those laws was the result merely of the provision for ratable distribution, which only operated to prevent preferences, and to make all kinds of estates, both real and personal, assets for the payment of debts, and to put specialty and simple contract creditors on the same footing, and so gave to all creditors the right to come upon the common fund. Equality between them was equity, but that was not inconsistent with the common-law rule awarding to diligence, prior to insolvency, its appropriate reward, or with conceding the validity of prior contract rights.

We repeat that it appears to us that the secured creditor is a creditor to the full amount due him when the insolvency is declared, just as much as the unsecured creditor is, and cannot be subjected to a different rule. And, as the basis on which all creditors are to draw dividends is the amount of their claims at the time of the declaration of insolvency it necessarily results, for the purpose of fixing that basis, that it is immaterial what collateral any particular creditor may have. The secured creditor cannot be charged with the estimated value of the collateral, or be compelled to exhaust it before enforcing his direct remedies against the debtor, or to surrender it as a condition thereto, though the receiver may redeem or be subrogated as circumstances may require.

Same—Same—
Secured Creditors
—Bankruptcy
Rule.

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Whatever congress may be authorized to enact by reason of possessing the power to pass uniform laws on the subject of bankruptcies, it is very clear that it did not intend to impinge upon contracts existing between creditors and debtors, by anything prescribed in reference to the administration of the assets of insolvent national banks; yet it is obvious that the bankruptcy rule confers what on its face gives the secured creditor an equal right with other creditors into a preference against him, and hence takes away a right which he already had. This a court of equity should never do, unless required by statute, at the time the indebtedness was created.

The requirement of equality of distribution among creditors by the national banking act involves no invasion of prior contract rights of any of such creditors, and ought not to be construed as having, or being intended to have, such a result.

Our conclusion is that the claims of creditors are to be determined as of the date of the declaration of insolvency, irrespective of the question whether particular creditors have security or not. When secured creditors have received payment in full, their right to dividends and their right to retain their securities cease, but collections therefrom are not otherwise material. Insolvency gives unsecured creditors no greater rights than they had before, though, through redemption or subrogation or the realization of a surplus, they may be benefited.

The case was rightly decided by the circuit court of appeals. Its decree in No. 54 is affirmed; and the decree of the circuit court, entered July 27, 1896, in pursuance of the mandate of that court, is also affirmed.

Remanded accordingly.

MR. JUSTICE WHITE, dissenting..

The court now decides: (1) That, on the failure of a national bank, a creditor thereof, whose debt is secured by pledge, is entitled to be recognized and classed by the comptroller of the currency to the full amount of his debt, without in any way taking into

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account the collaterals by which the debt is secured, and on the amount so recognized he is entitled to be paid out of the general assets the sum of any dividends which may be declared. (2) That this right to be classed for the full amount of the debt, without regard to the value of the collaterals, is fixed by the date of the insolvency, and continues to the final distribution, whatever may be the change in the debt thereafter brought about by the realization of the securities, provided only that the sums received by the creditor by way of dividends and from the amount collected from the collaterals do not exceed the entire debt, and therefore extinguish it.

I am constrained to dissent from these propositions, because, in my opinion, their enforcement will produce inequality among creditors, and operate injustice, and, as a necessary consequence, are inconsistent with the national banking act.

It cannot be doubted that the acts of congress, which regulate the collection and distribution of the assets of an insolvent national bank, are controlling. It is clear that every creditor who contracts with such bank does so subject to the provisions directing the manner of distributing the assets of such bank in case of its insolvency, and therefore that the terms of the act enter into and form part of every contract which such bank may make. Now, the act of congress makes it the duty of the receiver appointed by the comptroller to liquidate the affairs of a failed national bank, to take possession of and realize its assets (Rev. St. § 5234); to call, by advertisement for 90 days, upon creditors to present and make legal proof of their claims (*Id.* § 5235); and from the proceeds of the assets the comptroller is directed to make a "ratable dividend" on the recognized claims (*Id.* § 5236). To prevent preferences, the law, moreover, directs that all contracts from which preferences may arise, made after the commission of an act of insolvency, or in contemplation thereof, "shall be utterly null and void." *Id.* § 5242.

It seems to me superfluous to demonstrate that the

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rules now upheld by which a creditor holding security is decided to be entitled to disregard the value of his security, and take a dividend upon the whole amount of the debt from the general assets, violates the principle of equality and ratable distribution which the act of congress establishes. Is it not evident that, if one creditor is allowed to reap the whole benefit of his security, and at the same time take from the general assets a dividend on his whole claim, as if he had no security, he thereby obtains an advantage over the other general creditors, and that he gets more than his ratable share of the general assets? Let me illustrate the unavoidable consequence of the doctrine now recognized. A. loans a national bank \$5,000, and takes as the evidence of such loan a note of the bank for the sum named, without security. The lender is thus a general or unsecured creditor for the sum of \$5,000. B. loans to the same bank \$5,000, without security. He is applied to for a further loan, and agrees to loan another \$5,000 on receiving collateral worth \$5,000, and requires that a new note be executed for the amount of both loans, which recites that it is secured by the collateral in question. While theoretically, therefore, B. is a secured creditor for \$10,000, he practically has no security for \$5,000 thereof. Insolvency supervenes. The general assets received by the comptroller equal only 50 per cent. of the claims. Now, under the rule which the court establishes, A., on his unsecured claim of \$5,000, collects a dividend of but \$2,500, thereby losing \$2,500. B., on the other hand, who proves \$10,000, taking no account whatever of his collateral, realizes by way of dividends \$5,000, and by collections on collaterals a similar amount, with the result that though, as to \$5,000, he was, in effect, an unsecured creditor, he loses nothing. B. is thus in precisely as good a situation as though he had originally demanded and received from the borrowing bank collateral securities equal in value to the full amount loaned. It is thus apparent that the application of the rule would operate to enable B.—who, I repeat, vir-

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tually held no collateral security for \$5,000 of the sums loaned—to be paid his entire debt, though the assets of the insolvent estate of the borrower paid but 50 cents on the dollar, while another creditor, holding an unsecured claim for \$5,000, fails to realize thereon more than \$2,500. Is it not plain that this result is produced by practically a double payment to B., that is, by recognizing B. as a preferred creditor in the specific property, of the value of \$5,000, pledged to him, withdrawing that property from the general assets, and allowing B. to solely appropriate it, yet permitting him, when the secured part of his debt is thus virtually satisfied, to again assert the same secured portion of the debt against other assets by a claim upon the general fund in the hands of the receiver for the full amount loaned. The consequence of the receipt of this extra sum upon account of the already fully secured portion of the original loan is that B. is enabled to offset it against the deficient dividend on the unsecured portion of the debt, one equaling the other, thus closing the transaction without loss to him.

Let us suppose, also, the case of a creditor of a national bank, who recovers a judgment for \$100,000, and levies the same upon real estate of the bank worth only \$50,000. While the legal title and possession is still in the bank, a receiver is appointed, and takes possession of the real estate. Certainly it cannot be contended that this judgment lien holder is not in equally as good a position as the holder of a mortgaged lien or other collateral security. The doctrine of the court, however, if applied to the judgment lien holder, would authorize him to demand that the receiver treat the real estate as not embraced in the general assets, and that the creditor be allowed to enforce his whole claim against the other assets, irrespective of the value of the specific security acquired by his lien.

That the doctrine maintained by the court also tends to operate a discrimination, as between secured creditors, in favor of the one holding collateral securities

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not susceptible of prompt realization, is, I think, demonstrable. Thus a secured creditor, who takes collaterals maturing on the same day with the debt owing to himself, which collaterals consist of negotiable notes, the makers of which and indorsers upon which are pecuniarily responsible, finds the collaterals promptly paid when deposited for collection, and, if his debtor should become insolvent the day after payment, the creditor could only claim for the residue of the debt still unpaid. On the other hand, a creditor of the same debtor, the debt to whom matures at the same time as that owing the other creditor, and is secured by collaterals also due contemporaneously, has the collaterals protested for nonpayment, and when the debtor fails the collaterals have not been realized. While the first debtor, who had received first-class collateral, can collect dividends against the estate of his insolvent debtor only for the unpaid portion of the claim, losing a part of such residue by the inability of the estate to pay in full, the debtor who received poor collateral collects dividends out of the general assets on his whole claim, and, if he eventually realizes on his securities, may come out of the transaction without the loss of one cent. These illustrations, to my mind, adequately portray the inequality and injustice which must arise from the application of the rules of distribution now sanctioned by the court.

The fallacies which, it strikes me, are involved in the two propositions sanctioned by the court, are these: First. The erroneous assumption that, although the act of congress contemplates that the dividends should be declared out of the general assets after the secured creditors have withdrawn the amount of their security, it yet provides that the secured creditor who has withdrawn his security, and thus been *pro tanto* satisfied, can still assert his whole claim against the general assets, just as if he had no security, and had not been allowed to withdraw the same. Second. The mistaken assumption that the act confers upon the secured creditor a new and substantial right, enabling him to

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obtain, as a consequence of the failure of the bank, an advantage and preference which would not have existed in his favor had the failure not supervened. This arises from holding that the insolvency fixed the amount of the claim which the secured creditor may assert as of the time of the insolvency, thereby enabling him to ignore any collections which he may have realized from his securities after the failure, and permitting him to assert as a claim, not the amount due at the time of the proof, but, by relation, the amount due at the date of the failure; the result being to cause the insolvency of the bank to relieve the creditor holding security from the obligation to impute any collections from his collateral to his debt, so as to reduce it by the extent of the collections,—a duty which would have rested on him if insolvency had not taken place. Third. By presupposing that, because before failure a secured creditor had a legal right to ignore the collaterals held by him, and resort for the whole debt, in the first instance, against the general estate of his debtor, it would impair the obligation of the contract to require the secured creditor in case of insolvency to take into account his collaterals, and prevent him from asserting his whole claim, for the purpose of a dividend, against the general assets. But the preferential right arising from the contract of pledge is in no wise impaired by compelling the creditor to first exercise his preference against the security received from the debtor, and thus confine him to the specific advantage derived from his contract. Further, however, as the contract, construed in connection with the law governing it, restricts the secured, as well as the unsecured creditor to a ratable dividend from the general assets, the secured creditor is prevented from enhancing the advantage obtained as a result of the contract for security by proving his claim as if no security existed, since to allow him to so do would destroy the rule of ratable division, subject and subordinate to which the contract was made. A forcible statement of the true doctrine on the foregoing subject was expressed in the

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case of *Societe Generale de Paris v. Geen*, 8 App. Cas. 606. The question before the court arose upon the construction to be given to a clause of the English bankrupt act of 1869, incidental to the requirement of a section, expressly embodied for the first time in a bankrupt act, that the secured creditor should in some form account for the collateral held by him in proving his claim against the general estate. In considering the restriction upon the remedy of a secured creditor produced by the insolvency, and the consequent right of such creditor to receive only a ratable dividend on the balance of the debt after the deduction of the value of the collaterals, LORD FITZGERALD said (page 620) :

“Under ordinary circumstances each creditor is at liberty to pursue at his discretion the remedies which the law gives him ; but when insolvency intervenes, and the debtor is unable to pay his debts, the position of all parties is altered,—the fund has become inadequate, and the policy of the law is to lead to equality. In pursuing that policy, the bankrupt law endeavors to enforce an equal distribution, whilst it respects the rights of those who have previously, by grant or otherwise, acquired some security or some preferable right.”

To resort, however, to reasoning for the purpose of endeavoring to demonstrate that where a statute does not allow preferences in case of insolvency, and commands a ratable distribution of the assets, a secured creditor cannot be allowed to disregard the value of his security, and prove for the whole debt, seems to me to be unnecessary, since that he cannot be permitted to so do, under the circumstances stated, has been the universal rule applied in bankruptcy in England and in this country from the beginning.

In the earliest English bankrupt act (34 & 35 Hen. VIII. c. 4) the distribution of the general assets of the bankrupt was directed to be made “for true satisfaction and payment of the said creditors ; that is to say, to every one of the said creditors a portion rate and rate like, according to the quantity of their debts.” In the statute of 13 Eliz. c. 7 (and which was in force in this

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particular when the consolidated bankrupt statute of 6 Geo. IV. c. 16, was adopted) the distribution of assets was directed in language similar to that just quoted from the statute of Henry VIII. Under these statutes, from the earliest times, it was held by the lord chancellors of England, having the supervision of the execution of the bankrupt statutes, that a secured creditor could not retain his collateral security, and prove for his whole debt, but must have his security sold, and prove for the rest of the debt only. LORD SOMERS, in *Wiseman v. Carbonell* (1695) 1 Eq. Cas. Abr. 312, pl. ; LORD HARDWICKE, in *Re Howell* (1737) 7 Vin. Abr. 101, pl. 13, and in *Ex parte Grove* (1747) 1 Atk. 105 ; LORD THURLOW, in *Ex parte Dickson* (1789) 2 Cox, Ch. 196, and in *Ex parte Coming* (1790) *Id.* 225 ; Cooke, Bankr. Laws (1st Ed., 1786) 114, and *Id.* (4th Ed., 1799) 119.

In 1794 (4 Brown, Ch. *550) the prevailing practice with respect to a sale of a mortgage security was regulated by a general order formulated by LORD CHANCELLOR LOUGHBOROUGH, wherein, among other things, it was provided that, in case the proceeds of sale should be insufficient to pay and satisfy what should be found due upon the mortgage, "that such mortgagee or mortgagees be admitted a creditor or creditors under such commission for such deficiency, and to receive a dividend or dividends thereon out of the bankrupt's estate or effects, ratably and in proportion with the rest of the creditors seeking relief under the said commission," etc.

Concerning the practice in bankruptcy, LORD CHANCELLOR ELDON, in 1813, in *Ex parte Smith*, 2 Rose, 63, said :

"The practice has been long established in bankruptcy not to suffer a creditor holding a security to prove unless he will give up that security, or the value has been ascertained by the sale of it. The reason is obvious. Till his debt has been reduced by the proceeds of that sale, it is impossible correctly to say what the actual amount of it is. * * * It is, how-

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ever, clearly within the discretion of the court to relax this rule, and cases may occur in which it would be for the benefit of the general creditors to relax it."

The first two bankrupt statutes enacted in this country (Act April 4, 1800, c. 19 [2 Stat. 19]; Act Aug. 4, 1841, c. 9 [5 Stat. 440]) required a ratable distribution of the assets, and it was conceded in argument that the universal practice enforced under these acts was to require a creditor holding collateral security to deduct the amount of his security, and prove only for the residue of the debt. This court, speaking through MR. JUSTICE STORY, in 1845, in *Re Christy*, 3 How. 414, declared that under the act of 1841, "if creditors have a pledge or mortgage for their debt, they may apply to the court to have the same sold, and the proceeds thereof applied towards the payment of their debts *pro tanto*, and to prove for the residue."

As the universal rule and practice in bankruptcy in England and in this country, up to and including the bankrupt act of 1841, was solely the result of the statutory requirement that the assets should be ratably distributed among the general creditors, my mind fails to discern why the requirement for ratable distribution of the assets in the act for the liquidation of failed national banks should not have the same meaning, and produce the same result, as the substantially similar provisions had always meant and had always operated in England for hundreds of years, and in this country for many years before the adoption by congress of the act for the liquidation of national banks. Indeed, the fact that the requirement of ratable distribution had, by a long course of practice and judicial construction in England and in this country, required the secured creditor to account for his security before proving against the general assets, gives rise to the application of the elementary canon of construction that where words are used in a statute, which words, at the time, had a settled and well-understood meaning, their insertion into the statute carries with them a legislative adoption of the previous and existing meaning.

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The reasoning by which it is maintained that the requirement for ratable distribution should not be applied in the act providing for the liquidation of an insolvent national bank may be thus summed up: True it is that universally in bankruptcy in England and in this country the rule was as above stated, but outside of bankruptcy a different practice prevailed in England, known as the "chancery rule," and, as the winding up of an insolvent national bank does not present a case of bankruptcy, its liquidation is governed by such chancery rule, and not by the bankruptcy rule. The bankruptcy rule, it is said, is commonly so called because enforced by bankruptcy courts in the exercise of their "peculiar" jurisdiction, and the courts which refuse to apply the rule generally declare that it arose from express provisions in bankrupt statutes requiring a creditor to surrender his collaterals, or deduct for their value, before proving against the estate.

Pretermitted for a moment an examination of this reasoning, it is to be remarked, in passing, that the argument, if sound, rests upon the hypothesis that all the bankruptcy laws from the beginning in England and in our own country, and the universal course of decision thereon and the practice thereunder, have worked out inequality and injustice by depriving a secured creditor of rights which it is now asserted belonged to him, and which could have been exercised by him without producing inequality. This deduction follows, for it cannot be that, if not to compel the creditor to deduct produces no inequality or injustice, then to compel him to do so would have precisely the same result. The two opposing and conflicting rules cannot both be enforced, and yet in each instance equality result. At best, then, the contention admits that by the consensus of mankind not to compel the secured creditor to deduct the value of his collaterals before proving produces inequality, for of all statutes those relating to bankruptcy have most for their object an equal distribution of the assets of the insolvent among his creditors.

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It is worthy, also, of notice, in passing, that the reasoning to which we have referred rests upon the assumption that the act of congress providing for the liquidation of the affairs of a national bank and a distribution of the assets thereof among the creditors is not substantially a bankrupt statute. It certainly is a compulsory method provided by law for winding up the concerns of an insolvent bank, for preventing preferences, and for securing an equal and ratable division of the assets of the association among its creditors. And it assuredly can be safely assumed that congress, in adopting the rule of ratable distribution in the national banking act, did not intend that the words embodying the rule should be so construed as to produce a result contrary to that which, for hundreds of years, had been recognized as necessarily implied by the employment of similiar language. It may also, I submit, be likewise considered as certain that it was not intended, it using the words "ratable distribution" in the statute, to bring about an unequal, instead of a ratable, distribution of the general assets.

But, coming to the proposition itself, is there any foundation for the assertion that the rule or practice in bankruptcy requiring the secured creditors to account for his security was the result of something peculiar in the jurisdiction of bankruptcy courts, other than the requirement contained in bankruptcy statutes that the assets should be distributed ratably among creditors; and is there any merit in the contention that the rule was the consequence of an express provision in such laws imposing the obligation referred to on the secured creditor?

A careful examination of every bankrupt statute in England from the first statute of 34 & 35 Hen. VIII. c. 4, down to and including the consolidated bankrupt act of 6 Geo. IV. c. 16, fails to disclose any provision sustaining the statement that the rule in bankruptcy depended upon express statutory requirement, and, on the contrary, shows that it was simply a necessary outgrowth of the command of the statute that there

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should be an equal distribution of the bankrupt's assets.

I submit that, not only an examination of the English statutes makes clear the truth of the foregoing, but that its correctness is placed beyond question by the statement of LORD CHANCELLOR ELDON, respecting proof in bankruptcy by a secured creditor, already adverted to, that, "till his debt has been reduced by the proceeds of that sale [that is, of the security], it is impossible correctly to say what the actual amount of it is." And as an authoritative declaration of the origin of the rule the opinion of Vice Chancellor Malins in *Ex parte Alliance Bank* (1868) 3 Ch. App., note at page 773, is in point. The vice chancellor said:

"This rule [requiring a creditor to realize his security, and prove for the balance of the debt only] does not depend on any statutory enactment, but on a rule in bankruptcy, established irrespective of express statutory enactment, and under the statute of Elizabeth, which provides: 'Or otherwise to order the same [*i. e.* the assets] to be administered for the due satisfaction and payment of the said creditors; that is to say, for every one of the said creditors a portion, rate and rate alike, according to the quantity of his and their debts.'"

Indeed, not only was the obligation of the secured creditor to account for his security derived from the provision as to ratable distribution, but from that provision also originated the equally well-settled rule causing interest to cease upon the issuance of the commission of bankruptcy. As early as 1743, LORD HARDWICKE, in *Bromley v. Goodere*, 1 Atk. 75, in speaking of the suspension of interest by the effect of bankruptcy, said: "There is no direction in the act for that purpose, and it has been used only as the best method of settling the proportion among the creditors that they may have a rate-like satisfaction, and is founded upon the equitable power given them by the act."

While, generally, the claim that the bankruptcy rule was the creature of an express provision of the bankruptcy acts, other than the requirement as to a

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ratable distribution of assets, rests upon a mere statement to that effect without any reference to the specific text of the bankrupt act, which it was assumed made such requirement, in one instance, in the brief of counsel in an early case in this country (*Findlay v. Hosmer* [1817] 2 Conn. 320), the statement is made in a more specific form. A particular section of an English bankrupt statute is there referred to as, in effect, expressly requiring a secured creditor to account for his collaterals in order to prove against the general assets. The statute thus referred to was section 9 of 21 Jac. I. c. 19. But an examination of the section relied on shows that it in no wise supports the assertion. The pertinent portion of the section reads as follows :

“* * * All and every creditor and creditors having security for his or their several debts, by judgment, statute, recognizance, specialty with penalty or without penalty, or other security, or having no security, or having made attachments in London, or any other place, by virtue of any custom there used, of the goods and chattels of any such bankrupt, whereof there is no execution or extent served and executed upon any of the lands, tenements, hereditaments, goods, chattels and other estate of such bankrupts, before such time as he or she shall or do become bankrupt, shall not be relieved upon any such judgment, statute, recognizance, specialty, attachments or other security for any more than a ratable part of their just and due debts, with the other creditors of the said bankrupt, without respect to any such penalty or greater sum contained in any such judgment, statute, recognizance, specialty with penalty, attachment or other security.”

The securities other than attachment referred to in this section were manifestly embraced in the class known at common law as “personal” security, as distinguished from “real” security, or security upon property. Sweet, Law Dict. *verbo* “Security.” In other words, the effect of the section was but to forbid preference in favor of creditors which at law would have resulted from the particular form in which the

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debt was evidenced, and from which form a claim would be raised to a higher rank than a simple contract debt. That this is the significance of the word "security" as used in this section is shown by the following excerpt from Cooke's treatise on Bankrupt Laws, published in 1786. At page 114 he says :

"The aim of the legislature in all the statutes concerning bankrupts being that the creditors should have an equal proportion of the bankrupt's effects, creditors of every degree must come in equally ; nor will the nature of their demands make any difference, unless they have obtained actual execution, or taken some pledge or security before an act of bankruptcy committed. For when a creditor comes to prove his debt he is obliged to swear whether he has a security or not ; and, if he has, and insists upon proving, he must deliver it up for the benefit of his creditors, unless it be a joint security from the bankrupt and another person," etc.

The fact that the expression "security," contained in the section referred to, had no reference to security on property, is further demonstrated by the subsequent statute of 6 Geo. IV. c. 9, § 103, which re-enacted in an altered form the ninth section of the statute of James ; for the re-enacted section, although it referred in broad terms to securities generally, yet especially excepted the case of a mortgage or pledge. The section is as follows :

"Sec. 103. And be it enacted, that no creditor having security for his debt, or having made any attachment in London, or any other place by virtue of any custom there used, of the goods and chattels of the bankrupt, shall receive upon any such security or attachment more than a ratable part of such debt, except in respect of any execution or extent served and levied by seizure upon, or any mortgage of or lien upon any part of the property of such bankrupt before the bankruptcy."

Is it pretended anywhere that, after the re-enactment of section 9, St. Jac. I., found in section 103, c. 9, 6 Geo. IV., that the obligation of a secured creditor to

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account for his collateral before he took a dividend out of the general assets ceased to exist? Certainly, there is no such contention. If, however, that duty of the general creditor arose, not from the provision as to ratable distribution, but from the provisions of section 9 of the act of James as claimed, then necessarily such obligation on the part of the general creditor would have ceased immediately on the enactment of the statute of 6 Geo. IV., which expressly excepted the mortgage creditor from the operation of the particular section which it is contended imposed the duty on the mortgage creditor to account. The continued enforcement of the rule which required the mortgage creditor to deduct the value of his security before proving against general assets after the re-enactment of section 9 of the statute of George referred to can lead to but one conclusion; that is, that the duty of the mortgage creditor before existing arose from the provision for ratable distribution, and not from the terms of section 9 of the statute of James, since that duty continued to be compelled after the re-enactment of that section in terms which renders it impossible to contend that that section created the duty.

A similar course of reasoning applies to bankrupt statutes of this country.

Section 31 of our first bankrupt statute (chapter 19, Act April 4, 1800 [2 Stat. 30]) was, in substance and effect similar to the provision in the act of James. The statute of 1800 is said to have been a consolidation of the provisions of previous English bankrupt statutes (Tucker v. Oxley, 5 Cranch, 34, 42; Roosevelt v. Mark, 6 Johns. Ch. 285); and in Tucker v. Oxley, CHIEF JUSTICE MARSHALL declared that for that reason the decisions of the English judges as to the effect of those acts might be considered as adopted with the text that they expounded. Section 31 reads as follows:

"Sec. 31. And be it further enacted, that in the distribution of the bankrupt's effects, there shall be paid to every one of the creditors a portion-rate, according to the amount of their respective debts, so that every

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creditor having security for his debt by judgment, statute, recognizance, or specialty, or having an attachment under any of the laws of the individual states, or of the United States, on the estate of such bankrupt, (provided, there be no execution executed upon any of the real or personal estate of such bankrupt, before the time he or she became bankrupts) shall not be relieved upon any such judgment, statute, recognizance, specialty, or attachment, for more than a ratable part of his debt, with the other creditors of the bankrupt."

This provision of the act of 1800 was, however, omitted from the bankrupt act of 1841, manifestly because it had become unnecessary. The later statute contains in the fifth section a general provision forbidding all preferences except in favor of two classes of debts, thus rendering it superfluous to enumerate cases in which there should be no preference. It was, however, under the act of 1841, which was drafted by MR. JUSTICE STORY (2 Story's Life of Story, 407), that this court, speaking through that learned justice, in *Re Christy*, already cited, declared that a secured creditor must account for his security when proving against the bankrupt estate. How it can be now argued that the requirement that such creditor should only so prove his claim was the result of a provision not found in the act of 1841, and clearly shown by all the antecedent legislation not to refer to a creditor holding property security, my mind fails to comprehend.

True it is that both in our own act of 1867 and in the English bankrupt act of 1869 there were inserted express provisions requiring a secured creditor to account for his collaterals before proving against the general assets. But this was but the incorporation into the statutes of the rule which had arisen as a consequence of the requirement for a ratable distribution, and which had existed for hundreds of years before the statutes of 1867 and 1869 were adopted. In other words, the express statutory requirement only embodied in the form of a legislative enactment what theretofore from the earliest time had been universally

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enforced because of the provisions for a ratable distribution.

The rule in bankruptcy imposing the duty upon the creditor to account for his security before proving being, then, the result of the provision of the bankrupt laws requiring ratable distribution, I submit that the same requirements upon such creditor should be held to arise from a like provision contained in the act of congress under consideration.

But, coming to consider the chancery rule which it is contended lends support to the doctrines applied in the cases at bar.

The foundation upon which the so-called chancery rule rests is the case of *Mason v. Bogg*, 2 Mylne & C. 443, decided in 1837, where LORD CHANCELLOR COTTENHAM expressed his approval of the contention that a mortgage creditor, despite the death and insolvency of his debtor, possessed the contract right to assert his whole claim against general assets in the course of administration in chancery, without regard to his mortgage security. The question was not directly decided, however, as to whether the creditor might prove in the administration for the whole amount of the debt, but was reserved. As stated, however, the reasoning of the court favored the existence of such right, upon the theory that a court of chancery, when administering assets, in the absence of a statute regulating the subject, could not deprive a secured creditor of legal rights previously existing which he might have asserted at law, although, by permitting the exercise of such rights, preferences in the general assets would arise.

The next case in point of time in England—and, indeed, the one upon which most reliance is placed by those favoring the chancery rule—is *Kellock's Case*, reported in 3 Ch. App. 769, involving two appeals, and argued before SIR W. PAGE WOOD, L. J., and SIR C. J. SELWYN, L. J. The cases arose in the winding up of companies by virtue of the statute of 25 & 26 Vict. c. 89. The issue presented in each case was whether a creditor having collateral security was

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entitled to dividends upon the full amount of the debt without reference to the value of collaterals; and in one of the cases the lower court applied the doctrine supported by the reasoning in *Mason v. Bogg*, while in the other the lower court decided the bankruptcy rule governed. The appellate court held that the chancery practice should be followed. The claim was made that the secured creditor ought not to be allowed to take a dividend on the full amount of his claim, because, among other reasons, of section 133 of the act, which provided as follows:

"133. The following consequences shall ensue upon the voluntary winding-up of a company:

"(1) The property of the company shall be applied in satisfaction of its liabilities *pari passu* and, subject thereto, shall, unless it be otherwise provided by the regulations of the company, be distributed amongst the members according to their rights and interests in the company,"

This contention, however, was answered by LORD JUSTICE WOOD, who said (page 778):

"There is a clause in the companies act of 1862 which says that in a voluntary winding up equal distribution is to be made among creditors; an expression similar to which, in 13 Eliz. c. 7, appears to have led to the establishment of the rule in bankruptcy."

He then called attention to the fact that a voluntary winding up was not limited to cases of insolvent companies, but might be resorted to on behalf of a solvent one; and he proceeded to comment upon the fact that in previous winding-up acts, "when the legislature intended proceedings to be conducted according to the course in bankruptcy, it said so," concluding with the declaration that the omission to do so in the case before the court indicated the purpose of parliament that the court should be governed by the chancery rule. LORD JUSTICE SELWYN, in a measure, also adopted this view, saying (page 782):

"I think, therefore, that the onus is clearly thrown on those persons who come here and say that when the

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legislature, with a knowledge of the existence of the difference between the practice in bankruptcy and the practice in chancery, intrusted the winding up of the companies to the court of chancery, and said in express terms that the practice of the court of chancery was to prevail, they intended by some implication or inference to diminish, prejudice, or affect the rights of creditors. I can find no trace of any such intention. I think, therefore, we are bound to follow the established practice of the court of chancery, especially when we find that that practice has been followed ever since the passing of the winding-up act, and so long as winding-up orders have been made in the court of chancery."

The whole subject has been set at rest, however, in Great Britain, by section 25 of the judicature act of 1873, and by an amendment thereto, adopted in 1875 (chapter 77), which expressly required that in the administration in chancery of an insolvent estate of one deceased and in proceedings in the winding up of an insolvent company under the companies act "the same rule shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, * * * as may be in force for the time being under the law of bankruptcy, with respect to the estates of persons adjudged bankrupt."

So that now, in Great Britain, in all proceedings involving the distribution of an insolvent fund, a secured creditor can only prove for the balance which may remain after deduction of the proceeds or value of collateral security.

In view, therefore, of the English legislation in 1873 and 1875, which has rendered it impossible in cases of insolvency to apply the doctrine of the Kellock Case, we need not particularly notice decisions rendered in England subsequent to 1868, when the Kellock Case was decided, particularly as the tribunals which rendered such decisions were subordinate to the court of appeal, and necessarily bound by its rulings.

Now, I submit, as the English chancellors, from

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the date of the enactment of the earliest English bankrupt law, felt constrained to compel a secured creditor to account for his security before proving against the general assets of the bankrupt estate, because parliament had directed a ratable distribution of all such assets, it cannot, in consonance with sound reasoning, be said that this court is to apply the chancery rule to the distribution of the assets of an insolvent national bank, as to which congress has directed a ratable distribution, because in England a different rule was for a time applied to an act of parliament providing not solely for the liquidation of an insolvent estate, but equally to a solvent and insolvent one, and which rule was so applied in England because a particular statute was construed as requiring that the practice pursued in chancery in administering upon estates should govern.

It is worthy of note that LORD JUSTICE WOOD, after stating in his opinion in the Kellock Case that the bankruptcy rule was "adopted by a court having a peculiar jurisdiction, established for administering the property of traders unable to meet their engagements," conceded that the provision in the statute of 13 Eliz. c. 7, requiring equal distribution, "led to the establishment of the rule in bankruptcy." But the lord justice took the cases then under consideration out of the operation of the provision of the statute of Elizabeth because of provisions found in the companies act, which, in his opinion, gave rise to a contrary view in cases governed by that act. The distribution of the assets of a failed national bank under the act of congress, it is obvious, presents the "peculiar" features which LORD JUSTICE WOOD had in mind, since the requirement of ratable distribution is the exact equivalent of the provision contained in the statute of Elizabeth. But the reasoning now employed to cause the rule announced in the Kellock Case to apply so as to defeat the ratable distribution provided by the act of congress is made to rest upon the assumption that the act of congress does not contain the peculiar require-

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ment which was found in the bankruptcy acts, from which the duty of the secured creditor to account for his security before taking a dividend from the general assets arose. It comes, then, to this : That the theory by which the obsolete doctrine of the Kellock Case is made to apply rests upon an assumption which repudiates the reasoning of that case ; in other words, that the result of the Kellock Case is taken and applied to this case, while the reasoning upon which the decision of the Kellock Case was based is, in effect, denied.

That to permit a secured creditor to retain his specific contract security and also to prove against the general assets of his insolvent debtor for the whole amount of the debt was deemed to work out inequality is shown, not only by the fact that it was not applied in bankruptcy, but that, in the administration of equitable, as contradistinguished from legal, assets, courts of equity, following the maxim "*Æquitas est quasi equalitas*," would not permit claimants against equitable assets to share in the distribution of such assets until they had accounted for any advantage gained by the assertion against the general estate of the debtor of a preference permitted at law. *Morrice v. Bank*, Cas. t. Talb. 218 ; *Sheppard v. Kent*, 2 Vern. 435 ; *Deg v. Deg*, 2 P. Wms. 416 ; *Chapman v. Esgar*, 1 Smale & G. 575 ; *Bain v. Sadler*, L. R. 12 Eq. 570 ; *Purdy v. Doyle*, 1 Paige, 447 ; *Bank v. Lockridge*, 92 Ky. 472, 18 S. W. 1 ; 1 Story, Eq. Jur. (12th Ed.) p. 543 ; 1 Wats. Comp. Eq. (2d Rev. Ed.) p. 35, c. 11.

It was undoubtedly from a consideration of this fundamental rule of equity in construing the statutory requirement for ratable division of general assets that the bankruptcy rule was formulated. That rule, however, in effect declared that secured creditors might retain their preferential contract rights in particular portions of the estate of the insolvent debtor, but that it was the purpose of parliament, in commanding ratable distribution, that general assets—that is, assets disincumbered of liens—should be distributed only among the general or unsecured creditors ; the necessary effect

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being that a secured creditor could not prove against general assets without surrendering his security, thus becoming a general or unsecured creditor for the whole amount of the debt, or realizing upon the security, or in some form accounting for its value, in which latter contingency he would be general or unsecured creditor only for the deficiency. That the bankruptcy rule was deemed to be founded upon equitable principles, I think is demonstrated by the statement of LORD HARDWICKE in a case already mentioned,—*Bromley v. Goodere*, 1 Atk. 77,—where, after referring to the act of 13 Eliz. c. 7, he said :

“It is manifest that this act intended to give the commissioners an equitable jurisdiction as well as a legal one, for they have full power and authority to take by their discretions such order and direction as they shall think fit ; and that this has been the construction ever since ; and therefore, when petitions have come before the chancellor, he has always proceeded upon the same rules as he would upon causes coming before him upon the bill,—‘the rules of equity.’ ”

The foregoing reasoning renders it unnecessary to review at length the opinion delivered by the circuit court of appeals for the Sixth circuit in *Bank v. Armstrong*, 16 U. S. App. 465, 8 C. C. A. 155, and 59 Fed. 372, to which the court has referred, as the conclusions announced by the circuit court of appeals were rested on the assumption that the bankruptcy rule was the creature of an express statutory requirement, and that to prevent a secured creditor from proving for his whole debt, as of the time of the insolvency without regard to his collaterals, would deprive him of a contract right, both of which contentions have been fully considered in what I have already said. Nor is the case of *Lewis v. U. S.*, 92 U. S. 68, also referred to in the opinion of the court in the case at bar, controlling upon the question here presented. True, it was said in the *Lewis Case*, in passing, and upon the admission of counsel that “it is a settled principle of equity that a creditor holding collaterals is not bound

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to apply them before enforcing his direct remedies against the debtor," citing the Kellock and two other English and two Pennsylvania cases involving the question of the right of a creditor having the securities of distinct estates of separate debtors. But the controversy before the court in the Lewis Case was of this latter character, being between the United States, as creditor of a partnership and holding collaterals belonging to the partnership, and the trustee in bankruptcy of the separate estates of individual members of the partnership. The government was seeking to assert against such separate estates a right of preference given to it by statute. The court decided that, as the United States had a paramount lien upon all the assets of every debtor for the full satisfaction of its claim, it was unaffected by the bankruptcy statutes, and therefore was not controlled by any provision found therein for ratable distribution or otherwise. It is apparent, therefore, that the court, by the quoted statement, did not decide that a court of equity would apply the doctrine there set forth, where the rights of the secured creditor were limited and controlled by statute. If the secured creditor, who is allowed in the case now decided to disregard his security, and prove for the whole amount of his claim, had a paramount lien, not only upon his collaterals, but upon each and every asset of the insolvent bank, the rule in the Lewis Case would be apposite. But that is not the character of the case now before the court, since here a secured creditor has no paramount lien upon anything but his collaterals, and is governed in his recourse against the general assets by the requirement that there should be a ratable distribution.

As the case before us is to be controlled by the act of congress, it would appear unnecessary to advert to state decisions construing local statutes; but, inasmuch as those decisions were referred to and cited as authority, I will briefly notice them. They are referred to in the margin, and divide themselves into four classes: (1). Those which maintain that, where ratable distribution is required, the creditor must account for his

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security before proving.¹ (2) Those cases which, on the contrary, decide that, to allow the creditor to prove for his whole claim without deduction of security, is not incompatible with ratable distribution, and hold that the security need not be taken into account.² (3) Those cases which, while seemingly denying the obligation of the secured creditor to account for his security, yet practically work out a contrary result by requiring deduction upon collaterals as collected, and afforded remedies to compel prompt realization of collaterals.³ (4) Those which originated in purely local statutes, and which hold that the secured creditor can prove for the whole amount without reference to either the bankruptcy or the chancery rule.⁴ And in the margin I supplement the compilation heretofore made by a reference to some state statutes and decisions re-

1 *Amory v. Francis* (1820) 16 Mass. 308; *Farnum v. Boutelle* (1847) 13 Metc. (Mass.) 159; *Vanderveer v. Conover* (1838) 16 N. J. Law, 491; *Bell v. Fleming's Ex'rs* (1858) 12 N. J. Eq. 13, 25; *Whittaker v. Bank* (1894) 52 N. J. Eq. 400, 29 Atl. 203; *Fields v. Creditors of Wheatley* (1853) 1 Sneed, 351; *Winston v. Eldridge* (1859) 3 Head, 361; *Wurtz v. Hart* (1862) 13 Iowa, 515; *Searle v. Brumback* (Ohio, 1862) 4 West. Law Month. 330; *In re Frascch* (1892) 5 Wash. 344, 31 Pac. 755, and 32 Pac. 771; *National Union Bank v. National Mechanics' Bank* (1895) 80 Md. 371, 30 Atl. 913; *Branch v. Bank* (1896) 57 Kan. 37, 45 Pac. 88; *Security Inv. Co. v. Richmond Nat. Bank* (1897) 58 Kan. 414, 49 Pac. 521.

2 *Findlay v. Hosmer* (1817) 2 Conn. 350; *Moses v. Ranlet* (1822) 2 N. H. 488; *West v. Bank* (1847) 19 Vt. 403; *Walker v. Barker* (1854) 26 Vt. 710, 714; *In re Bates* (1886) 118 Ill. 524 9 N. E. 257; *Furness v. Bank* (1893) 147 Ill. 570, 35 N. E. 624; *Levy v. Bank* (1895) 158 Ill. 88, 42 N. E. 129; *Allen v. Danielson* (1887) 15 R. I. 480, 8 Atl. 705; *Greene v. Bank* (1895) 18 R. I. 779, 30 Atl. 963; *People v. E. Remington & Sons* (1890) 121 N. Y. 328, 24 N. E. 793; *Bank v. Haug* (1890) 82 Mich. 607, 47 N. W. 33; *Kellogg v. Miller* (1892) 22 Or. 406, 30 Pac. 229; *Winston v. Biggs* (1895) 117 N. C. 206, 23 S. E. 316.

3 *In re McCune's Estate* (1882) 76 Mo. 200; *State v. Nebraska Sav. Bank* (1894) 40 Neb. 342, 58 N. W. 976; *Jamison v. Commission Co.* (1894) 59 Ark. 548, 552, 28 S. W. 35; *Philadelphia Warehouse Co. v. Anniston Pipe Works* (1895) 106 Ala. 357, 18 South. 43; *Erle v. Lane* (1896) 22 Colo. 273, 44 Pac. 591.

4 *Shunk's Appeal* (1845) 2 Pa. St. 304; *Morris v. Olwine* (1854) 22 Pa. St. 441, 442; *Keim's Appeal* (1856) 27 Pa. St. 42; *Miller's Appeal* (1860) 35 Pa. St. 481; *Patten's Appeal* (1863) 45 Pa. St. 151. And see a reference to the cases in Pennsylvania in *Boyer's Appeal* (1894) 163 Pa. St. 143, 29 Atl. 1001.

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ferring to statutes which expressly provide that the claimants upon an insolvent estate can only prove for the balance due, after deduction of any security held.⁵

Of course, for the purposes of this case, only the first two classes of cases need be considered. The first class is well represented by two Massachusetts cases: *Amory v. Francis*, 16 Mass. 308, and *Farnum v. Boutelle*, 13 Metc. 159. In the first-named case CHIEF JUSTICE PARKER said (page 310): "If it were not so, the equality intended to be produced by the bankrupt laws would be grossly violated, and the creditor holding the pledge would, in fact, have a greater security than that pledge was intended to give him. For originally it would have been security only for a portion of the debt equal to its value; whereas by proving the whole debt, and holding the pledge for the balance, it becomes security for as much more than its value as is the dividend which may be received upon the whole debt."

In the later case CHIEF JUSTICE SHAW announced the rule as follows (page 164):

"If the mortgage remained in force at the time of the decease of the debtor, then it is very clear, as well upon principle as upon authority, that the creditors cannot prove their debt without first waiving their mortgage, or in some mode applying the amount thereof to the reduction of the debt, and then proving only for the balance. *Amory v. Francis*, 16 Mass. 308."

The second class of cases may be typified by the case of *People v. E. Remington & Sons*, 121 N. Y. 328, 24 N. E. 793, where the conclusion of the court

⁵ *Indiana*: *Combs v. Trust Co.*, 146 Ind. 688, 691, 46 N. E. 16. *Kentucky*: St. 1894 (Barb. & C. Ed.) p. 193, c. 7, § 74; *Bank v. Lockridge*, 92 Ky. 472, 18 S. W. 1. *Massachusetts*: Act April 23, 1838, c. 163, § 3; Gen. St. 1860, c. 118, § 27. *Michigan*: 2 How. Ann. St. p. 2156, § 8824. *Minnesota*: By Act March 8, 1860, the security is made the primary fund, to which resort must be had before a personal judgment can be obtained against the debtor for a deficit. *Swift v. Fletcher*, 6 Minn. 550 (Gil. 392). *New Hampshire*: Laws 1862, c. 2594. *South Carolina*: *Piester v. Piester*, 22 S. C. 146; *Wheat v. Dingle*, 32 S. C. 473, 11 S. E. 394. *Texas*: *Sayles' Civ. St.* 1897, art. 83; Acts 1879, c. 53, § 13; *Willis v. Holland* (1896; Tex. Civ. App.) 36 S. W. 329.

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was placed upon the ground that the rule in bankruptcy originated in an express requirement in the bankrupt acts other than that for a ratable distribution. The court, speaking through GRAY, J., said (page 332, 121 N. Y., and page 794, 24 N. E.):

"Some confusion of thought seems to be worked by the reference of the decision of the question to the rules of law governing the administration of estates in bankruptcy; but there is no warrant for any such reference. The rules in bankruptcy cases proceeded from the express provisions of the statute, and they are not at all controlling upon a court administering, in equity, upon the estates of insolvent debtors. The bankruptcy act requires the creditor to give up his security, in order to be entitled to prove his whole debt; or, if he retains it, he can only prove for the balance of the debt, after deducting the value of the security held. The jurisdiction in bankruptcy is peculiar and special, and a particular mode of administration is prescribed by the act."

Having thus eliminated the bankruptcy rule, the court reviewed the decisions in *Mason v. Bogg and Kellock's Case*, and held those cases to be controlling. The *Remington Case*, therefore, as well as those of which it is a type, need not be further reviewed, as the fundamental error upon which they rest has been fully stated in what I have previously said.

It is necessary, however, to call attention to the fact that in the cases which decline to apply the rule in bankruptcy, and refuse to enforce the provision for ratable distribution, there is an entire want of harmony as to the time when the rights of creditors are fixed with respect to the amount of the claim which may be proved against general assets; some holding that dividends are to be paid on the amount due at the date of insolvency, others on the amount due at the time of proof, and others upon the sum due when dividends are declared. This confusion is the necessary outcome of the erroneous premise upon which the cases rest. A similar confusion, moreover, I submit, is manifested by

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the rule now announced by the court; since, while it is avowedly rested upon the defunct chancery rule exemplified in *Mason v. Bogg* and the *Kellock Case*, yet, in effect, it fails to follow the very rule upon which the decision is based. This is clear when it is borne in mind that the chancery rule was decided in both *Mason v. Bogg* and the *Kellock Case* to be that the amount of the claim of the creditor was fixed by the date when proof was actually made; and yet, under the authority of the chancery rule, and the cases in question, the court now decides that the rights of the secured creditor are fixed by insolvency. Thus the chancery rule is applied, and at the same time repudiated in an important particular, for the grave difference between allowing a secured creditor to prove only for the amount due when proof was made, and therefore compelling him to account for all collections realized on collaterals up to that time, and allowing him, long after insolvency, to prove, by relation, as of the date of the insolvency, and disregard the collections actually made, is manifest. In this connection it may not be amiss to call attention to the fact that, if the bankruptcy rule was applied in the proof of claims, the amount of the claim would not vary, whether the date of insolvency or the time when proof was made was held to be the date when the rights of the creditor in the fund were fixed.

Moreover, I submit that the propositions now adopted, which reject the bankruptcy rule, rests on reasoning which, if it be logically applied, requires the enforcement of the bankruptcy rule in its integrity. It seems to me it has been shown by the doctrine announced by LORD HARDWICKE in 1743 (*Bromley v. Goodere, supra*) that the stoppage of interest on the claims of all creditors was but an essential evolution of the principle of ratable distribution. This stoppage of interest at the period named is now upheld by the rule sanctioned by this court. This, then, takes the provision of the bankruptcy rule which favors the secured creditor, and which arises alone ratable division, and gives him the benefit of it, while at the same time

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rejecting the obligation to account, which arises from and depends on the very principle of ratable distribution which is in part enforced. To repeat, it strikes my mind that the conclusion now announced is this: that the obsolete chancery rule both applies and does not apply, that the bankruptcy rule at the same time does not apply and does apply; the result of this conflict being to so interpret the act of congress as to strike from it the beneficent provision for equality of distribution among general creditors.

MR. JUSTICE HARLAN and MR. JUSTICE MCKENNA, concur.

MR. JUSTICE GRAY dissenting.

While also unable to concur in the opinion of the majority of the court, I prefer to rest my dissent upon the effect of the legislation of congress, read in the light of the English statutes and decisions before the American Revolution, and of the judgments of the courts of the United States, without particularly considering the cases in England in recent times, or the conflicting decisions made in the courts of the several states under local statute or usage or upon general theory. As the course of reasoning in support of this view traverses part of the ground covered by the other dissenting justices, I shall endeavor to state it as shortly as possible.

The English bankrupt acts in force at the time of the Declaration of Independence, so far as they touched the distribution of a bankrupt's estate among his creditors, were the statute of 13 Eliz. (1571) c. 7, § 2, which directed the estate to be applied to the "true satisfaction and payment of the said creditors; that is to say, to every of the said creditors a portion, rate and rate like, according to the quantity of his or their debts"; and the statute of 21 Jac. I. (1623) c. 19, § 8 (or section 9), which made more specific provisions against allowing any creditors, whether "having security" or not, to prove "for any more than a ratable

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part of their just and due debts with the other creditors of the said bankrupt." As appears on the face of this provision, the word "security" was evidently there used, not as including a mortgage or other instrument executed by the debtor by way of pledging part of his property as collateral security for the payment of a debt, but merely as designating a bond or writing which was evidence of the debt itself as a direct personal obligation; and the objects of the provision would appear to have been to put all debts, whether by specialty or by simple contract, upon an equal footing in the ratable distribution of a bankrupt's estate, and to permit the real amount only of any debt, and not any larger sum named in a bond or other specialty, to be proved in bankruptcy. 4 Statutes of the Realm, 539, 1228; 2 Cooke, Bankr. Laws (4th Ed.) [18] [33]; 1 Cooke, Bankr. Laws, 119; Bac. Abr. "Obligations," A; 3 Bl. Comm. 439.

Neither of those statutes contained any provision whatever for deducting the value of collateral security and proving the rest of the debt. Yet from the earliest period of which there are any reported cases it was uniformly held,—without vouching in any provision of the bankrupt acts other than those directing a ratable distribution among all the creditors,—and had, long before the American Revolution, become the settled practice in the court of chancery, that a creditor could not retain collateral security received by him from the bankrupt, and prove for his whole debt, but must have his collateral security sold, and prove for the rest of the debt only. The authorities upon this point are collected in the opinion of MR. JUSTICE WHITE.

After the American Revolution, the provision of the statute of James I. was thrice reenacted, with little modification. St. 5 Geo. IV. (1824) c. 98, § 103; 6 Geo. IV. (1825) c. 16, § 108; 12 & 13 Vict. (1849) c. 106, § 184. But the rule established by the decisions and practice of the court of chancery as to the proof of secured debts was never expressly recognized in any of the English bankrupt acts until 1869, when provis-

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ions to that effect were inserted in the statute of 32 & 33 Vict. c. 71, § 40. And there is no trace of a different rule in England in proceedings in equity for the distribution of the estate of any insolvent debtor or corporation until more than 60 years after the Declaration of Independence. *Amory v. Francis* (1820) 16 Mass. 308, 311; *Greenwood v. Taylor* (1830) 1 Russ. & M. 185; *Mason v. Bogg* (1837) 2 Mylne & C. 443. In 1868, indeed, the court of chancery declined to apply the bankruptcy rule to proceedings under the winding-up acts. *Kellock's Case*, 3 Ch. App. 769. But parliament, by the judicature acts of 1873 and 1875, applied that rule to such proceedings. St. 36 & 37 Vict. c. 66, § 25 (1); 38 & 39 Vict. c. 77, § 10. And SIR GEORGE JESSEL, M. R., has pointed out the absurdity of having different rules in the cases of living and of dead bankrupts. *In re Hopkins* (1881) 18 Ch. Div. 370, 377.

The first bankrupt act of the United States, enacted in 1800, was in great part copied from the earlier bankrupt acts of England, and condensed the provisions above mentioned of the statutes of Elizabeth and of James I. in this form: "In the distribution of the bankrupt's effects, there shall be paid to every of the creditors a portion-rate, according to the amount of their respective debts, so that every creditor having security for his debt by judgment, statute, recognizance or specialty, or having an attachment under any of the laws of the individual states, or of the United States, on the estate of such bankrupt (provided there be no execution executed upon any of the real or personal estate of such bankrupt, before the time he or she became bankrupts), shall not be relieved upon any such judgment, statute, recognizance, specialty or attachment, for more than a ratable part of his debt with the other creditors of the bankrupt." Act April 4, 1800, c. 19, § 31 (2 Stat. 30). That provision must have received the same construction that had been given by the English judges to the statutes therein reenacted. *Tucker v. Oxley* (1809) 5 Cranch, 34, 42; *Scott v.*

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Armstrong (1892) 146 U. S. 499, 511, 13 Sup. Ct. 148.

The bankrupt act of 1841, which is well known to have been drafted to MR. JUSTICE STORY, omitted that section and made no specific provision whatever as to the proof of secured debts, but simply provided that "all creditors coming in and proving their debts under such bankruptcy, in the manner hereinafter prescribed, the same being *bona fide* debts shall be entitled to share in the bankrupt's property and effects, *pro rata*, without any priority or preference whatsoever, except only for debts due by such bankrupt to the United States, and for all debts due by him to persons who, by the laws of the United States, have a preference, in consequence of having paid moneys as his sureties, which shall be first paid out of the assets." Act Aug. 19, 1841, c. 9, § 5 (5 Stat. 444).

Yet MR. JUSTICE STORY, both in the circuit court and in this court, laid it down as an undoubted rule that a secured creditor could prove only for the rest of the debt after deducting the value of the security given him by the bankrupt himself of his own property. *In re Babcock* (1844) 3 Story, 393, 399, 400, Fed. Cas. No. 696; *In re Christy* (1845) 3 How. 292, 315.

The omission by that eminent jurist when framing the act of 1841, of all specific provisions on the subject as unnecessary, and his repeated judicial declarations, after he had been habitually administering that act for three or four years, recognizing that rule as still in force, compel the inference that a general enactment for the ratable distribution of the estate of an insolvent among all the creditors had the effect of preventing any individual creditor, while retaining collateral security on part of the estate, from proving for his whole debt.

In 1864, congress, in the first national bank act, after providing for the appointment of a receiver with power to convert the assets of any insolvent national bank into money, and pay it to the treasurer of the United States, subject to the order of the comptroller of the

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currency, further provided that: "From time to time the comptroller, after full provision shall have been first made for refunding to the United States any such deficiency in redeeming the notes of such association as is mentioned in this act, shall make a ratable dividend of the money so paid over to him by such receiver on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction." Act. June 3, 1864, c. 106, § 50 (13 Stat. 115).

The words of this act requiring "a ratable dividend" to be paid "on all claims" proved or adjudicated, are equivalent to the words of the last preceding bankrupt act, directing that "all creditors coming in and proving their debts" "shall be entitled to share" in the estate "*pro rata*, without any priority or preference whatsoever"; and, in view of the judicial construction which had been given to that act, may reasonably be considered as having been intended by congress to have the same effect of preventing a creditor, secured on part of the estate, from proving his whole debt without relinquishing or applying the security, although neither act specifically so provided.

If such was the rule under the national bank act of 1864, it could not be affected, as to national banks, by the express affirmance of the rule in the bankrupt act of 1867, or by the re-enactment of the provisions of each of these two acts in the Revised Statutes. And the extension of the bankrupt act of 1867 to "moneyed business or commercial corporations and joint-stock companies" increases the improbability that congress intended banking associations to be governed by a different rule from that governing other private corporations, as well as natural persons, in regard to the effect which a creditor's holding collateral security should have upon the sum to be proved by him against an insolvent estate. Act March 2, 1867, c. 176, §§ 20, 37 (14 Stat. 526, 535); Rev. St. §§ 5075, 5236.

Reliance has been placed upon the remark of MR. JUSTICE SWAYNE in *Lewis v. U. S.*, 92 U. S. 618, 623, that "it is a settled principle in equity that a cred-

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itor holding collaterals is not bound to apply them before enforcing his direct remedies against the debtor." But he added, "This is admitted," so that it is evident that the point was not controverted by counsel, or much considered by the court. Nor was it necessary to the decision, which had nothing to do with the right of an individual creditor, holding security upon the separate property of the debtor, to prove against his estate in bankruptcy, but simply affirmed the right of the United States, holding a debt against an English partnership, to prove the whole amount of the debt against one of the partners, an American, in proceedings in bankruptcy here under the act of 1867, without surrendering or accounting for collateral security given to the United States by the partnership. The United States were not bound by the bankrupt acts, nor subject to the rule of a ratable distribution, but were entitled to preference over all other creditors. *U. S. v. Fisher*, 2 Cranch, 358; *Harrison v. Sterry*, 5 Cranch, 289; *U. S. v. State Bank*, 6 Pet. 29; *U. S. v. Herron*, 20 Wall. 251. And, even as to a private creditor, it has always been held that he is obliged to account for such securities only as he holds from the debtor against whose estate he seeks to prove; and that a creditor proving against the estate of a partnership is not bound to account for security given to him by one partner, nor a creditor proving against the estate of one partner to account for security given him by the partnership. *Ex parte Peacock* (1825) 2 Glyn & J. 27; *In re Plummer* (1841) 1 Phil. Ch. 56; *Rolfe v. Flower* (1866) L. R. 1 P. C. 27, 46; *In re Babcock*, 3 Story, 393, 400, Fed. Cas. No. 696. To require a creditor, before proving against the estate of one partner, to surrender to the assignee of that estate security held from the partnership, would be to add to the separate estate property which should go to the estate of the partnership. The ground and the limits of the rule in bankruptcy were clearly stated by LORD CHANCELLOR LYNTHURST in *Plummer's Case*, above cited, in which a partnership creditor was allowed to prove a

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partnership debt against the separate estate of each partner without surrendering or realizing security held by him from the partnership. The lord chancellor said : "Now, what are the principles applicable to cases of this kind? If a creditor of a bankrupt holds a security on part of the bankrupt's estate, he is not entitled to prove his debt under the commission, without giving up or realizing his security. For the principle of the bankrupt laws is that all creditors are to be put on an equal footing ; and therefore, if a creditor chooses to prove under the commission, he must sell or surrender whatever property he holds belonging to the bankrupt. But, if he has a security on the estate of a third person, that principle does not apply. He is, in that case, entitled to prove for the whole amount of his debt, and also to realize the security, provided he does not altogether receive more than twenty shillings in the pound. That is the ground on which the principle is established. It is unnecessary to cite authorities for it, as it is too clearly settled to be disputed ; but I may mention *Ex parte* Bennet, 2 Atk. 527, *Ex parte* Parr, 1 Rose, 76, and *Ex parte* Goodman, 3 Madd. 373, in which it has been laid down. The next point is this. In administration under bankruptcy the joint estate and the separate estate are considered as distinct estates, and accordingly it has been held that a joint creditor, having a security upon the separate estate, is entitled to prove against the joint estate without giving up his security, on the ground that it is a different estate. That was the principle upon which *Ex parte* Peacock proceeded, and that case was decided first by SIR JOHN LEACH and afterwards by LORD ELDON, and has since been followed in *Ex parte* Bowden, 1 Deac. & C. 135. Now, this case is merely the converse of that, and the same principle applies to it." 1 Phil. Ch. 59, 60.

This court, under the existing national bank act, approving and following the example of the English courts under the statute of 13 Elizabeth, above cited, has allowed creditors to set off, against their claims

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on the estate, debts due from them to the debtor whose estate is in course of distribution, although the statute in question in either case contained no provision directing or permitting a set-off. *Scott v. Armstrong*, 146 U. S. 499, 511, 13 Sup. Ct. 148. In giving effect to a statute which simply directs an equal and ratable distribution of a debtor's estate among all creditors, without saying anything about either collateral security or set-off, there would seem to be quite as much ground for requiring each creditor to account for his collateral security, for the benefit of all the creditors, as for allowing him the benefit of a set-off, to their detriment.

For the reasons thus indicated, I cannot avoid the conclusion that under every act of congress directing the ratable distribution among all creditors of the estate of an insolvent person or corporation, and making no special provision as to secured creditors an individual creditor, holding collateral security from the debtor on part of the estate in course of administration, is not entitled to a dividend upon the whole of his debt without releasing the security or deducting its value; and that, therefore, the judgment of the circuit court of appeals should be reversed.

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v.

STOCKTON *et al.*

(*Circuit Court of Appeals, Fifth Circuit, Jan. 3, 1899.*)

Power of Insolvent National Bank to Transfer Property.*—Section 5242 of the Revised Statutes of the United States does not make it unlawful for a national bank, acting in good faith, to borrow money and give security for the same after it is legally in contemplation of insolvency; and, where the question is wholly between other credit-

*See note at end of case.

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ors who have received due advantage from the loan, the fact that the lender is allowed to retain a portion of the money so borrowed as security for an antecedent debt due from the bank to him does not vitiate the whole transaction.

Same—Authority of President—Validity of Unauthorized Deed.—The president of a natural bank, who had exclusive charge of its affairs, and owned a controlling interest, executed a deed to certain property of the bank, under what purported to be a certified copy from the minutes of the board of directors, to secure an advance to the bank, made in good faith, when the bank was legally in contemplation of insolvency. The deed was recorded on the day upon which the bank closed its doors. It did not appear from the minutes of the board of directors that the president had any authority to execute the deed. *Held*, that the deed was valid as an equitable mortgage, and sufficient to bind the bank's receiver.

APPEAL by receiver from the Circuit Court of the United States for the Southern District of Florida. *Affirmed*.

F. P. Fleming and *F. P. Fleming, Jr.*, for appellant.
C. D. Rinchart and *W. H. Baker*, for appellees.

Before PARDEE and McCORMICK, Circuit Judges,
and PARLANGE, District Judge.

McCORMICK, Circuit Judge. In the opening of the brief of counsel for the appellees there is a statement of this case, which, on examination, we have found to be correct and admirable. Case Stated.

It is as follows: This is a suit brought by the receiver of the Merchants' National Bank of Ocala, an insolvent national bank, to have vacated and set aside certain transfers of real and personal property made by the Ocala bank before the bank went into the hands of the receiver, upon the ground that these transfers were made by the Ocala bank contrary to the provisions of section 5242 of the Revised Statutes. The facts out of which this controversy arose may be briefly stated as follows: The defendant Clarence B. Collins was in 1896 state treasurer of Florida, and had a large amount of state funds deposited with the Ocala bank, estimated at about \$42,000. About October 18th of that year, R. B. McConnell, who was president of the Ocala bank, notified Collins that the bank would have to have more money, or suspend. Collins telegraphed the

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defendant Stockton, who was president of the National Bank of the State of Florida, of Jacksonville, Fla., to meet him and McConnell at Jacksonville (Stockton's home). On the 18th they met at Stockton's house. The situation was discussed, and Stockton, on behalf of his bank, refused to advance McConnell or the Ocala bank any money. McConnell then made a statement of the financial condition of his bank, which statement was accepted as true by the others. This statement was that the Ocala bank owed \$95,000 to depositors, of which \$42,000 was due to Collins leaving \$53,000 due to others, and of this about \$30,000 was under his personal control, in one way or another, and would not be drawn ; that he had \$12,000 in cash assets, and only owed \$20,000 in bills payable, which were amply secured ; that the assets of the bank were double the amount of all of its liabilities. The reason assigned by McConnell for the condition of the bank was the general financial depression, the uncertainty attending the approaching presidential election, the difficulty in making collections, and the spreading of malicious and false reports about him and the bank by persons maliciously disposed towards him and his bank. Finally an agreement was entered into between Collins and McConnell, acting on behalf of the Ocala bank. Collins agreed to advance to the Ocala bank \$15,000, through Stockton and the Jacksonville bank ; and McConnell, for the Ocala bank, was to execute notes to the Jacksonville bank for this sum. The Ocala bank was to transfer, to Stockton and the Jacksonville bank, and did so transfer, certain security. These securities were of three classes : (1) Bills receivable, and other like collateral ; (2) the equity of the Ocala bank in certain collateral already hypothecated with the National City Bank of New York City ; and (3) the city lot in Ocala upon which the bank building of the Ocala bank was located. This lot was conveyed by warranty deed to John N. C. Stockton, the deed being absolute on its face. The indebtedness secured may in like manner be divided into three classes : (1)

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The \$15,000 advanced on or about October 18, 1896 ; (2) a note for \$22,000 given to represent that much of the deposit of \$42,000 heretofore mentioned ; (3) whatever balance in open account there might be then due Collins. At the time these transactions were entered into, Stockton and Collins believed the Ocala bank to be solvent, although the after developments tended to show that McConnell must have known that the bank was insolvent. The testimony introduced by the complainant (appellant here) through the witness Redding, showing that McConnell kept for the bank two sets of books ; one set being the usual set kept by the bank, and the other set, known as the "Reconcilement Book," for the private information of himself. In this reconcilement book he kept the items that from time to time should have been charged to his bank's account with its correspondents, and items that should have been credited to his correspondents. In the statements of the condition of the Ocala bank made to Stockton and Collins, McConnell did not take his figures from his reconcilement book, but gave a set of figures at that time useful to his purpose. Fifteen thousand dollars, on the faith of these collaterals, was loaned to the Ocala bank by Collins, and received by that bank. Afterwards, on January 14, 1897, the Ocala bank closed its doors, and subsequently the complainant was appointed by the comptroller of the currency its receiver. The deed to the bank building and lot was recorded January 14, 1897 ; an effort having been made on the 13th to have the deed recorded. There was no agreement between the parties not to record the deed, or to withhold it from record. The deed of conveyance was executed by McConnell as president of the Ocala bank, under what purported to be a certified copy from the minutes of the board of directors. The defendants when they parted with their money relied upon this resolution as being true and worthy of full confidence. The complainant proved that no such resolution appeared upon the minute book of the bank, and, by the testimony of several directors, that no such resolution

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had ever been passed. McConnell had committed suicide in the time between the failure of the Ocala bank and the filing of the bill in this case. The testimony of all the directors examined showed that McConnell was the owner of a controlling interest in the bank, and that the management of its affairs was exclusively under his immediate control. The directors knew nothing of the business of the bank. No meetings of directors were ever held, except at long intervals; and then such meetings were only formal, and simply ratified such action of the president as he deemed advisable, and passed such resolutions as he wished passed. By consent and stipulation of the parties to the suit, while the bill was pending, and before final decree, the real estate was sold, and the amount of the purchase price, \$8,000, was deposited in the registry of the court. This stipulation provided that all questions concerning the ownership and disposition of the money should be settled in this suit. Some moneys (\$1,949.23) were, under a similar stipulation, deposited in the registry of the court, which moneys arose out of collections made out of the equity in the collateral hypothecated with the National City Bank of New York City. The cause coming on to be heard on final hearing, the lower court adjudged (1) that the attempt to secure the \$22,000 note and open account were void; (2) that the defendants were entitled to the benefit of all the security, including the mortgage on the bank building and lot (then represented by deposit in the registry), until the full sum of \$15,000, with interest, had been paid, including in such payment all dividends; (3) that an accounting of the collateral held by the defendants should be had. By this decree the complainant felt aggrieved, and appealed to this court, and assigns as error the entry of such final decree, and more specifically the allowing of any lien upon either of the three classes of security for the payment of the notes for \$15,000.

The assignment of errors, with 11 specifications, presents two questions: (1) Was it competent for the

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bank to secure the \$15,000 advanced by Collins at the time the security was given? (2.) Was the security attempted to be given on the real property sufficient to bind the receiver? The circuit court answered both of these questions in the affirmative. The receiver insists that this ruling was erroneous, and, with regard to the first question, founds his contention on section 5242 of the Revised Statutes, which reads as follows:

“All transfers of the notes, bonds, bills-of-exchange, or other evidences of debt owing to any national banking association, or of deposits to its credit; all assignments of mortgages, sureties on real estate, or of judgements or decrees in its favor; all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shoreholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in a manner prescribed by this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void. * * *

It could hardly be contended by counsel for the appellees that at the time this advance was made to the bank the president had any reasonable expectation of being able to extricate it from its difficulties. And if, in charity, we should concede that he had persuaded himself to believe that this advance would enable him to regain and maintain the credit of his bank, he must, as JUDGE WALLACE said in *Roberts v. Hill*, 24 Fed. 571, have taken counsel of his hopes, and not of his judgment. It being thus reasonably apparent to the officers of the bank that it must presently be unable to meet its obligations, it will be conceded that the bank was legally in contemplation of insolvency when this advance of \$15,000 was made to it by Collins. The proof, we think, shows that Collins and Stockton relied on the

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representations made by the president of the bank, and in good faith acted thereon. Those representations, if they had been true, were reasonably sufficient to justify the belief on the part of Collins and Stockton that the bank, though temporarily in difficulty, was in fact solvent, and, with the aid asked, might overcome its embarrassments. In such circumstances it was not unlawful for the bank to seek, or for others to extend, help. It would indeed be difficult for a bank ever to borrow money, if the mere fact that it needed to borrow money put all who were able and willing to aid it upon notice that it was in contemplation of insolvency, in such a sense and to such an extent as to deprive it of capacity to bind itself, and them of capacity to take security from it. There is certainly nothing in the statute to support this view. It forbids the transfer of securities made with a view to prevent the application of its assets in the manner prescribed by law, or with a view to the preference of one creditor to another, with a named exception. As to this \$15,000 advance, it cannot reasonably be said that it gave Collins any preference, or that it was made with a view to obtain for him a preference in reference to it. He paid out the money. It went into the bank. Not a dollar of it, so far as the record shows, went to any preferred creditor. It was used, and doubtless all used up, in the regular operations of the bank. For this advance he took security, which at the time did not appear to be, and which is proved not to have been, excessive,—certainly not beyond that reasonable margin of surplus which safe investments require. As a part of this transaction, it was provided that this reasonable amount of surplus in the security should be held by the party making the desired and necessary advance as security for an antecedent debt due from the bank to him. This part of the transaction did violate the statute, and was void. The appellant contends that, being void as to this part, it cannot be held good as to the advance at that time received by the bank. He supports his contention with

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this extract from the opinion of JUDGE WALLACE in *Armstrong v. Bank*, 41 Fed. 234:

"If the sending of the securities had resulted, either in consequence of a subsequent express contract, or in consequence of any implication from the nature of the transaction, in giving the defendant a lien for the antecedent indebtedness of the Fidelity Bank, it is extremely doubtful whether the transaction could be upheld. The cases of *Bank v. Colby*, 21 Wall. 609, and *Bank v. Butler*, 129 U. S. 223, 9 Sup. Ct. 281, take a view of the statute which suggests that no preference can be obtained by one creditor of a national bank over another, after the bank has become insolvent, whether obtained with the consent of, or by adversary proceedings against, the bank, and whether the creditor has or has not any reason to suppose the bank to be insolvent at the time."

In the same opinion we find this language:

"The statute is directed to a preference, not to the giving of security when a debt is created; and if the transaction be free from fraud in fact, and is intended merely to adequately protect a loan made at the time, the creditor can retain property transferred to secure such loan until the debt is paid, even though the debtor is insolvent, and the creditor has reason at the time to believe that to be the fact."

We have carefully examined the cases of *Bank v. Colby* and *Bank v. Butler*, *supra*, and find that they both relate wholly to antecedent debts. And, as we construe these cases and the case of *Armstrong v. Bank*, they do not support the contention of the appellant in this case, and are not inconsistent with the ruling of the circuit court. There is no question in this case as to the lien in favor of the United States on all the securities of the bank to protect its circulation. The question is one wholly between other creditors. And it appears to us inequitable to hold that other creditors, who must be presumed to have received their due advantage from the advance of the \$15,000 made by Collins, should be suffered to keep that advantage, and to require him to surrender security which he in good faith took at the time he made the advance.

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As to the second contention of the appellant, we think the deed given by the president of the bank must be held to be good as a pledge for the repayment of the money received thereon at the time the pledge was given. There is nothing in the statutes of the United States which forbids this transfer being made in the manner that it was made, if the directors of the bank had in fact authorized it. There was nothing in the transaction, therefore, to charge Collins with notice that the president was not authorized to convey the real estate, or that the president was not authorized to certify to a resolution purporting to be taken from the minutes of the proceedings of the board of directors. It is manifest that the design of the parties was that the deed should serve as security for the repayment of the money. On this, in part, the money was advanced. And even though the deed be wanting in full, formal execution as an act of the bank, the general authority of a president, and the general relation of this president to the bank, and all the circumstances and conditions under which the deed was given, we think, are sufficient to sustain it as an equitable mortgage, under the statutes and decisions of the state of Florida. *Margarum v. Orange Co.*, 37 Flá. 165, 19 South. 637. The deed to the bank building and lot was recorded the same day the bank closed. An effort had been made on the previous day to have the deed recorded. There was no agreement between the parties not to record the deed, or to withhold it from record for any time. As between the parties, the deed, if otherwise good as a mortgage, was good, without reference to whether it was recorded or not. *Rogers v. Munnerlyn*, 36 Fla. 591, 18 South. 669. We think it would be going very far to hold that, under these circumstances and conditions, the general creditors obtained by force of the United States statutes a lien on this property before the filing of the deed for record. At the most, there is nothing to show priority in favor of

Same—Authority
of President—Val-
idity of Unau-
thorized Deed.

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either, as the failure of the bank and the filing of the mortgage for record were contemporaneous. We conclude that the decree of the circuit court appealed from should be, and it therefore is, affirmed.

NOTE.

Power of Insolvent National Bank to Secure Subsequent Debt.—The National Bank act does not prohibit a national bank after an act of insolvency, or when it is in contemplation of insolvency, to transfer property, to secure a loan made after the bank is in such condition. *Casey v. La Societe de Credit Mobilier*, 2 Wood (U. S.) 77; s. c. 37 Am. Rep. 508. And if the transaction is in good faith, the creditor can retain the property so transferred until the debt is paid, even though the creditor, at the time of the transfer was chargeable with notice of the bank's condition. *Armstrong v. Chemical Nat. Bank*, 41 Fed. Rep. 234, 238-39.

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LADD *et al.*

(*Supreme Court of Oregon, March 20, 1899.*)

Banks—Collections—Liability for Negligence.—Although a bank makes no direct charge for its services in collecting, the benefits which it ordinarily and usually derives from the use of funds while in its custody, and the advantages which may arise from business associations, constitute a sufficient consideration to make the bank liable for negligence in collecting.

Same—Same—Customs.*—It is not negligence for a bank receiving for collection an ordinary unendorsed check against an account with a bank situated and doing business at a place distant from where the collecting bank is located, and where the collecting bank has no agent or correspondent to forward the check by mail directly to the drawee bank for collection and returns where such method is sanctioned by a general and well-established custom among banks.

Same—Same—Same—Reasonableness—Presumptions.—A party attacking such custom has the burden of proving it unreasonable.

Immaterial Question.—Where plaintiff was not injured by the retention of a draft by the collecting bank, it is immaterial whether the action of the bank in retaining it was or was not ratified by plaintiff.

*See note at end of case.

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APPEAL by plaintiffs from Multnomah county circuit court. *Affirmed.*

This is an action to recover damages for alleged negligence on the part of the defendants in the attempted collection of a check drawn by plaintiff in their favor upon the United States Banking Company. The defendants are bankers, located at Portland, and the United States Banking Company at Sheridan, 50 miles distant. The plaintiff resided at Grand Ronde, some 15 miles from Sheridan, and, on January 16, 1894, forwarded from there the check in question to the defendants at Portland, with instructions to collect, and remit a certificate of deposit for one year, bearing interest. The check was received by defendants January 18th, and forwarded to the United States Banking Company the same day, for collection and return. The banking company received it the next day, and on the 23d drew a draft for the amount thereof upon the Merchants' National Bank, its correspondent at Portland, and on the 24th sent the same through the mail to defendants, who received it the same day, and presented it for payment, which was refused. They immediately notified plaintiff by letter at Grand Ronde, and asked for instructions. Plaintiff replied on the 27th, saying: "I am at a loss as to the best course to pursue in the matter. I understand that there has been no attachment issued on the bank at Sheridan. The prevailing opinion is that they will be able to make satisfactory arrangements as soon as J. M. Baldridge, the vice president of the U. S. Banking Co., returns from the East, which will take place in a few days. However, if you think best, hold the check; if not, return to me. Any advice you can give me will be greatly appreciated." Defendants received the reply on the 30th, and on the 31st sent a letter to plaintiff, of which the following is a copy: "We have written to the Bank of Sheridan that they return the check for \$1,500 which we sent to them for collection for you, as requested. They replied to us that the sheriff was in charge at present, and they could not do

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it. We herewith hand you the check for \$1,500 which they remitted for your check, and we think that you had better take it, as it is the evidence of your claim against the bank, and go to Sheridan, and see what you can do in the matter of getting your money." Plaintiff had \$1,717.71 on deposit with the banking company at the date of his check. The company closed its doors January 24th. It had cash on hand, January 20th, \$2,726.25; January 21st, \$2,891.50; January 23d, \$2,973.71; January 24th, \$2,265.42. On February 3d plaintiff assigned his said deposit to Paul Fundman for the purpose of collection, who thereupon sued the company, attached its property, and subsequently procured judgment; but, owing to prior attachments, the first of which was issued January 26th, was unable to secure anything thereon. At the time the defendant forwarded the check to the banking company, it was in good standing, and had theretofore paid all demands promptly. The defendants had no correspondent at Sheridan, but a reliable express agency and another bank were located there, the latter of which had been doing business but a short time, and defendants did not appear to have had any knowledge of its existence. The defense is set up that the check in question was a plain, ordinary one, without indorsements; that defendants undertook and agreed to collect the same in accordance with the custom and ordinary method by which such collections were made by banks; that there was no agreement by which they were to receive compensation for their services; that, in attempting to collect said check, they pursued the general and universal custom obtaining among banks in Portland and elsewhere, and that by reason thereof they were not chargeable with negligence. As a second defense, it is alleged that plaintiff ratified defendants' said acts by accepting the draft remitted to them by the banking company, and retaining the same for more than a year without making any claim for negligence against the defendants. Trial was had before the court, and, judgment being for defendants, plaintiff appeals.

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O. P. Coshow and *O. H. Irvine*, for appellant.
S. B. Linthicum, for respondents.

WOLVERTON, C. J. (after stating the facts). The question presented is whether the defendants were guilty of negligence in forwarding plaintiff's check direct to the bank upon which it was drawn, and in retaining the evidence of indebtedness until it had closed its doors, and its property had been seized on attachment. The instrument was a plain, ordinary check, unindorsed, save as it may have been indorsed by the defendants prior to forwarding the same for collection and return. The engagement of the defendants was to collect and issue a certificate of deposit for the proceeds, drawing interest. There is some controversy as to whether the

Banks—Collections—
 Liability for
 Negligence.

defendants were to receive any compensation for their services; but the very terms in pursuance of which they undertook the collection would indicate that they were to receive a sufficient consideration to make them liable for neglect of the duty enjoined upon them. They were to have the use of the money when collected, upon which they intended to pay the plaintiff interest; and this, we are impelled to believe, would be sufficient within itself. Generally speaking, it can make no difference that a bank makes no direct charge for its services in collecting, for the benefits which it ordinarily and usually derives from the use of the funds while in its custody, and the advantages which may arise from business associations, are held and deemed to be adequate consideration for the undertaking, and quite sufficient upon which to predicate the liability incident thereto. *Bank v. Goodman*, 109 Pa. St. 422, 2 Atl. 687; *Bailie v. Bank*, 95 Ga. 277, 21 S. E. 717; *Titus v. Bank*, 35 N. J. Law, 588. In the ordinary transaction, where a check is given and received in payment of a demand, the discharge of the demand is conditional upon the honor and payment of the check when presented in due course of established business usages, sanctioned by law; but failure to present it to the drawee for payment within the proper time, depending upon the

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proximity of the payee and the drawee to each other, and to notify the drawer of nonpayment, will discharge the drawer's obligation to the extent of his loss by reason of such failure of demand and notice. *Gregg v. George*, 16 Kan. 546. It is said: "A check differs from a bill of exchange in several particulars. It has no days of grace, and requires no acceptance distinct from prompt payment. The drawer of the check is not a surety, but the principal debtor, as much as the maker of a promissory note. It is an absolute appropriation of so much money in the hands of the banker to the holder of the check, and there it ought to remain until called for, and the drawer has no reason to complain of delay, unless upon the intermediate failure of his banker. By unreasonable delay in such a case the holder takes the risk of the failure of the person or bank on which the check is drawn." 3 Kent, Conn. *104, note 2. The rule governing the time in which the holder is required to present a check in order to relieve himself from the risk of loss by failure of the drawee may be stated as follows: If the payee receives the check in the same place where the bank upon which it is drawn is located, he may present it for payment at any time before the close of banking hours of the next secular day, and thereby maintain recourse against the drawer. If, in the meantime, the bank fails, the loss will be the drawer's. The term "secular day" is used to exclude Sunday, so that, if the check be received on Saturday, the payee would have all day on the Monday following in which to make the presentment. But, if the payee receives the check in a place distant from where the drawee bank is situated, it will be sufficient for him to forward it by post, on the next secular day after it is received, to some person at the latter place, who is required to present it for payment on or before the next day after it reaches him in due course of mail. These periods, depending upon the location of the respective participants, which are declared requisite for the convenient presentment of a check, are deemed to have been contemplated by the

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drawer, and he remains absolutely liable, although the bank might fail pending their duration. 2 Daniel, Neg. Inst. §§ 1590, 1592; Farwell v. Curtis, 7 Biss. 160, Fed. Cas. No. 4,690. The allowance of a day, however, in which to present the check, does not extend to an agent who receives one for the debt of his principal. Such a check must be presented with due and proper diligence; otherwise, it is at the peril of the party retaining it and postponing presentment as between him and the person in whose interest he is acting. Smith v. Miller, 43 N. Y. 171; Anderson v. Gill (Md.) 29 Atl. 527. The rules in respect to giving notice of the dishonor of a check are the same as where a bill of exchange or promissory note is involved. If anything, however, by reason of the intention of the parties to the instrument that the payment should be immediate, and of the fact that it is drawn against a deposit, they are to be more strictly construed and enforced in the case of a check than of other commercial paper. Tied. Com. Paper, § 442.

The parties agree that at the time the transactions which form the basis of the present controversy took place there existed, and still exists, among the banks in Portland and elsewhere, a general and well-established custom to the effect that when a bank or banker receives for collection an ordinary check against an account with a bank or banker situated and doing business at a place distant from where the collecting bank is located, and such collecting bank has no agent or correspondent at the place of the drawee bank, for the collecting bank to forward the check by mail directly to the drawee bank for collection and returns; and that it is also a general and well-established custom among such banks that when a bank or banker receives, from a bank or person at a distance, for collection and return, an ordinary check, drawn upon a bank situated at the same place as the receiving bank, for the receiving bank not to remit cash to the bank or person from whom such check was received, but to remit the check or draft, either of the receiving or drawee bank,

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drawn upon the correspondent of such receiving or drawee bank at the place from which the original check was forwarded, payable to the order of the bank or person from whom the check was received. It is contended by the respondents that these customs are to be considered the law of the case, and are controlling for the government of the parties; and that, measured thereby, the defendants are not chargeable with negligence for pursuing the course adopted in endeavoring to make the collection. Upon the other hand, it is maintained that the custom of sending the check direct to the drawee bank for collection and return is unreasonable, and therefore that it does not and cannot obtain the sanction of law, and that such an act is negligence *per se*, which will, in case loss should occur by reason thereof, render the collecting bank liable therefor. The reason assigned is that the collecting bank thereby makes the drawee bank its agent for presentment, demand, protest, and giving notice of nonpayment to the indorsers, if any, and the drawer; and that the duties thus devolving upon such an agent are inconsistent, and incapable of being performed by the drawee of the check, as it is said he cannot present a demand to himself, or demand payment of himself, much less protest his own paper, and give notice to the proper parties that he has refused payment. There exist two different theories among the courts of this country touching the responsibility of banks undertaking collections on commercial paper at a distance. One line of authorities holds to the rule that the forwarding bank is liable only for the selection of a suitable local agent with whom to intrust the collection, and that the agent so selected becomes the agent of the owner of the paper; while, on the other hand, it is held that the forwarding bank makes the local agent its own subagent, and is liable for any neglect on the part of such subagent. But it is argued that in either event the defendants are liable, as, under the latter rule, they became absolutely responsible for the conduct of the Sheridan Bank, while, under the former,

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it was negligence *per se* to have selected the Sheridan Bank as agent for the purpose of consummating the collection. It does not appear to us, however, to be necessary to the determination of the present controversy that either rule should be adopted or applied. The check in question was drawn payable to the defendants, and was unindorsed by any one, so that there were no indorsers or third parties in the transaction to be subserved, and protest and notice thereof were unnecessary, and not required. The defendants, therefore, assumed the simple duty of presenting the check for payment, under the rules of law obtaining, and, if not paid, or payment was refused, of notifying the drawer, so that he might not suffer loss by reason of the failure of the drawee bank.

In *Prideaux v. Criddle*, L. R. 4 Q. B. 455, it is said: "A presentment through the post office is a reasonable mode of presentment. It is a very common mode, and, having regard to the commercial business of this country, it may be said to be a proper mode, of presentment. If the drawee dishonors the check, and the holder sends notice of dishonor to the person from whom he received the check on the day following that on which the check was dishonored, each previous transferee has one day in which to give notice of dishonor." In *Bailey v. Bodenham*, 16 C. B. (N. S.) 288, ERLE, C. J., was inclined to think that a check sent through the post to the drawee was a good presentment, and he says: "But, unless the money was remitted by return of post, the absence of an answer should have been considered as a dishonor, and notice of such dishonor should have been given promptly." In *Heywood v. Pickering*, L. R. 9 Q. B. 428, where the check was sent to the drawees direct, with demand for payment, BLACKBURN, J., thought it to be a good presentment for payment, and that the refusal to remit constituted an actual dishonor of the check. QUAIN, J., in the same case, says: "There is ample evidence that, according to the custom of bankers, when a foreign check is paid to a banker by a customer, that is the usual mode

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of transmitting checks. Is that a good presentment? In *Bailey v. Bodenham*, ERLE, C. J., and BYLES, J., thought that sending a check by post to a banker might be a good presentment of a check; and in *Prideaux v. Criddle*, LUSH, J., was of the opinion that a presentment through the post office was a reasonable mode of presentment. Therefore we have it that in the present case there was a due presentment of the check according to these authorities." As supporting this position, see, also, 2 Daniel, Neg. Inst. § 1559. These are English cases, it is true, but a like manner of presentment seems to have received recognition in this country. In the case of *Indig v. Bank*, 80 N. Y. 100, a note, unindorsed, payable at the bank of Lowville, was placed in the hands of defendant for collection, who, instead of sending it to an agent or correspondent at Lowville for presentment, sent it by mail directly to the Lowville Bank. It was remarked that such a method appeared to be the ordinary one for the transaction of such business, and the defendant was bound only to adopt the ordinary mode, and that the practice was sanctioned by the English cases. It was there contended that by sending the note direct to the Lowville Bank the collecting bank thereby constituted the Lowville Bank its agent; but it was held that, in so far as it related to the presentment of the note at the bank, and the duties of the bank in respect to it, it was equivalent to a check drawn by the maker upon the bank where the note was payable. As the case bears some analogy to the one at bar, we may be pardoned if we quote somewhat at length from the opinion of RAPALLO, J. He says: "The bank owed a duty to its customer to pay it on presentation, if in funds. The defendant used the United States mail to make the presentment, and by this means caused it to be presented to the bank for payment on the day when due. It did not deposit it there for collection. If there had been indorsers, it might be argued that the defendant constituted the bank of Lowville its agent to notify the indorsers of nonpayment; but even this is

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very questionable, for it was held in a similar case that, if the proceeds were not remitted, the paper should be deemed dishonored, and notice of nonpayment should be given by the bank which had sent it. *Bailey v. Bodenham*, 16 C. B. (N. S.) 288. No such question arises, however, in the present case, for there were no indorsers. The defendant, by sending the note to the Bank of Lowville, requested it to pay it, not to receive the proceeds. The object of sending was to extract money from the bank, as agent of the maker of the note, not to put money in the bank as agent of the defendant, or to the credit of the defendant. There is nothing in the nature of the transaction which should render the defendant guarantor of the solvency of the Bank of Lowville. * * * The bank on which the note is drawn has nothing to do but to pay the note if in funds, and, if not, to refuse to pay. If it pays, it does so on behalf of the maker, and no relation is created between it and one who presents it by mail, different from that which would exist if presented through any other agency, unless accompanied by a request to do some further act in behalf of the sender beyond complying with its duty to its own customer." And in *Briggs v. Bank*, 89 N. Y. 182, the same learned judge, in explanation of the opinion rendered in the *Indig Case*, says: "The point of the decision is that the mere act of presenting the paper for payment by mail, instead of employing a messenger to present it, does not constitute the drawee agent of the sender to receive or hold the proceeds." To the same effect, see, also, *People v. Merchants', & M. Bank*, 78 N. Y. 269. It will be noted that the presentment in the case of *Heywood v. Pickering* was in accordance with the custom then prevailing, and the one in the *Indig Case* was in pursuance of the ordinary method; and the custom in the one case and the method in the other were very similar to the one which it is agreed by the parties exists among the banks of Portland and elsewhere, and they seem to have been considered as controlling, and as legalizing the presentment in the respective

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manners there adopted. Mr. Tiedeman, in his work on Commercial Paper (§ 444), says: "A custom has grown up of late to send the check direct to the bank upon which it is drawn; in other words, to make presentment by mail. The sufficiency of this method of presentment has been doubted, but it seems that this method is more or less commonly adopted, and the weight of authority is in favor of its sufficiency."

In the light of these authorities, we are constrained to hold that the transmission of the check in question by the defendants direct to the Sheridan Bank, through the post, for collection and return, operated as a good presentment for payment.

A custom which obtains so generally and universally among men of the highest order of business sagacity appeals strongly to the understanding for recognition, and, unless demonstrated to be clearly and palpably unreasonable and unjust, it ought to be adopted as the law of the case. It is true, the admittedly prevailing custom or usage exists and applies as well to certified checks, certificates of deposit, and notes payable at the banks; but we are here dealing with a simple, unindorsed check, and are only called upon at this time to sanction the custom or usage in so far as it may be potent as affecting the present exigencies. However, there is authority for the sanction of it to the full extent prevailing, as denoted by the agreement of the parties here. *Trust Co. v. Newland* (Ky.) 31 S. W. 38; *Jefferson Co. Sav. Bank v. Commercial Nat. Bank* (Tenn. Sup.) 39 S. W. 338. Usages are presumed to be reasonable, and in considering them the courts do not so much determine whether they are supported by satisfactory grounds as whether they are necessarily unreasonable. The party attacking the usage or custom has, therefore, the burden of the controversy, as the question to be decided in a particular case is not whether the usage is reasonable, but whether it is unreasonable. 27 Am. & Eng. Enc. Law. 766.

Same—Same—
Customs.

Same—Same—
Same—Reason-
ableness—Pre-
sumptions.

Cases are cited and relied upon by the appellant, wherein it is held to constitute an act of negli-

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gence, and even negligence *per se*, for the collecting bank to send paper direct to the drawee bank, located at a distant place, for collection and return. The most conspicuous of these are: Bank v. Goodman, 109 Pa. St. 422, 2 Atl. 687; Bank v. Burns, 12 Colo. 539, 21 Pac. 714; Anderson v. Rodgers (Kan. Sup.) 36 Pac. 1067; Drovers' Nat. Bank v. Anglo-American Packing & Provision Co., 117 Ill. 100, 7 N. E. 601; Farwell v. Curtis, *supra*; Whitney v. Esson, 99 Mass. 308; First Nat. Bank v. City Nat. Bank (Tex. Civ. App.) 34 S. W. 458; First Nat. Bank v. Fourth Nat. Bank, 6 C. C. A. 183, 56 Fed. 967; Bailie v. Bank, 95 Ga. 277, 21 S. E. 717. But in no one of these cases was there a general and universal custom relied upon to support the act of the collecting bank, as there is here. The case of Whitney v. Esson, *supra*, comes the nearest. The paper involved was a draft, and it is there said: "It is not a reasonable usage that one who collects a draft for an absent party should be allowed to give it up to the drawee, and sacrifice the claim which the owner may have on prior parties, upon the mere receipt of a check, which may turn out to be worthless." But this must be read in connection with the agreement of the parties in that case, which was that it was a common practice for holders of drafts or checks to accept the check of the drawee in exchange for the draft, but it was not claimed to be a generally established usage. In Farwell v. Curtis, *supra*, it was said the practice of sending checks by mail to the drawee was not usual, thereby indicating that no such custom or usage was there established or relied upon. In Drovers' Nat. Bank v. Anglo-American Packing & Provision Co., *supra*, a custom was sought to be established, but it was not broad enough, as remarked by the court, to include the certified check which formed the basis of the action. And in First Nat. Bank v. City Nat. Bank, *supra*, the statement of the case shows it did not appear that the owners of the paper, by consent or usage, authorized the forwarding of their draft direct to the drawee. These cases involve, indiscriminately,

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ordinary checks, certificates of deposit, certified checks, and drafts. Upon principle it would seem that the usage is not an unreasonable one, in so far, at least, as it may apply to the collection of a plain, unindorsed check. If payment of such check is refused, the payee may sue the drawer for breach of contract; but the drawer only can sue the drawee, and this upon the implied contract to pay upon demand. The bank of deposit has but a simple duty to perform when the paper is presented for payment only, and that is to honor it by compliance with the demand; so that the manner of presentment and demand for payment, whether over the counter or through the post, cannot affect the discharge of such duty. In no sense can it become the agent of the party presenting it, or of the drawer, by acting in the discharge of its duty in honoring it, and making payment. Where a party employs a bank to make a collection at a place distant from where the bank is located, and nothing is said touching the specific manner of making the same, it must be presumed it was intended by the customer of the bank that the collection would be made in the usual and ordinary manner, and in accordance with the general usage and custom prevailing among banks. If the collection is made in accordance therewith, the bank has performed its undertaking, *Trust Co. v. Newland, supra*; *Jefferson Co. Sav. Bank v. Commercial Nat. Bank, supra*.

Now, to recur to the facts: The plaintiff had on deposit with the Sheridan Bank \$1,717.71. Of this fund he proposed sending \$1,500 to the defendants, in Portland, for the purpose of making a time deposit with them, drawing interest. He informed the Sheridan Bank of his intention to draw upon it for that amount, and, as a means of having the money transmitted to Portland, he drew his check in favor of the defendants. They, in pursuance of the custom, sent it by mail to the Sheridan Bank for collection and return. This must be considered a demand upon that bank for payment, and it had but a simple duty to perform, which was to pay; and this it should have done, not as the

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act of either the defendants or the plaintiff, but for itself; and therefore it could not have been the agent of either in the performance of such duty. The failure to pay upon presentment and demand was a refusal to pay, and a dishonor of the check, and the defendants, not having received payment thereof by return mail (having regard for the business hours of the banking company and the arrival and departure of the mails), should have so treated it, and notified the plaintiff thereof by the following mail, or, at least, by the mail of the following day. It was the duty of the defendants, they not being in a condition to sue the drawee, to notify the plaintiff at once of the dishonor of his paper, so that he could have brought an action against it, if he so desired, for the recovery of his deposit. But the case was not presented upon the theory that the loss to plaintiff was caused by the negligence of defendants failing to notify him of the dishonor of his paper. By this, however, we do not intimate that the facts as disclosed by the record would support such theory.

The specific charges of negligence are that defendants sent the check direct to the drawee bank for collection, and retained the evidence of indebtedness until after the bank had closed. Upon the first ground we have seen that the act of sending the check direct to the drawee for collection was not negligence, under the usage and custom prevailing, and in the light of defendants' undertaking; and, upon the second ground, it is plain that plaintiff could not have been injured by the retention of the check, as he was enabled to and did sue without it. In this view, the question of ratification becomes unimportant. The findings of fact are full upon all the issues made, and amply support the conclusions of law. The judgment will therefore be affirmed.

Immaterial Question.

NOTES.

Collections—Selecting Drawee Bank as Correspondent.—The drawee bank is not a proper agent to collect the draft, and the forwarding bank will be liable for all loss resulting from the selection

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of the drawee bank for such purpose. *Evansville First Nat. Bank v. Louisville Fourth Nat. Bank*, 56 Fed. Rep. 967; *German Nat. Bank v. Burns*, 12 Colo. 539, 13 Am. St. Rep. 247; *Drovers' Nat. Bank v. Anglo-American Packing, etc., Co.*, 18 Ill. App. 191, 117 Ill. 100, 57 Am. Rep. 855; *Anderson v. Rodgers*, 53 Kan. 542; *Whitney v. Esson*, 99 Mass. 308, 96 Am. Dec. 762; *Wagner v. Crook*, 167 Pa. St. 259, 46 Am. St. Rep. 672. But compare *Farmers' Bank, etc., Co. v. Newland* (Ky. 1895), 31 S. W. Rep. 38.

Same—Same—Forwarding Draft—Agency.—In *People v. Merchants', etc., Bank*, 78 N. Y. 269, 34 Am. Rep. 532, it was decided that where a bank receives from one of its customers for collection a check or draft drawn upon another bank at a distant place, and, for the purpose of collecting the paper, sends it by mail to the bank upon which it is drawn with the request to remit the amount, the collecting bank, by so sending the paper to the drawee directly for payment, does not constitute the drawee its agent to receive the proceeds, and consequently does not become guarantor of the solvency of the drawee; and that, in such a case, though the drawee has funds of the drawer of the paper, and charges it to his account as paid, but fails to pay to the collecting bank, the latter is not responsible to its customer for the amount, unless there has been some negligence. According to these decisions, the act of forwarding the paper is equivalent merely to making a presentation of the paper by mail. See also *Indig v. National City Bank*, 80 N. Y. 100.

But if, in a case of this description, it can be established that the correspondent bank was the agent of the forwarding bank, the forwarding bank becomes liable to the depositor. *St. Nicholas Bank v. State Nat. Bank*, 128 N. Y. 26; *Briggs v. Central Nat. Bank*, 89 N. Y. 182, *affirming* 61 How. Pr. (N. Y.) 250, 42 Am. Rep. 285. In these cases the court *distinguished* *Indig v. National City Bank*, 80 N. Y. 100, and in the first case cited it was said that it was a border case, and that its doctrine should not be extended.

In *German Nat. Bank v. Burns*, 12 Colo. 539, 13 Am. St. Rep. 247, the cases from 78 and 80 New York, *supra*, were *distinguished* upon the ground that in those cases the paper forwarded for collection was merely that of a customer of the collecting bank who had made the paper payable at such bank. But the court in *Indig v. National City Bank*, 80 N. Y. 106, said: "A note payable at a bank where the maker keeps his account is equivalent to a check drawn by him upon that bank, except that in the case of a note the failure to present for payment does not discharge the maker. But as far as the question now under consideration is concerned, the effect is the same."

Same—Same—Usages.—The practice of sending the paper to the debtor bank is justified by the custom of London banks. *Russell v. Hankey*, 6 T. R. 12.

Presentment by Mail.—By the custom of London bankers, where a foreign check is paid to a banker by a customer, if the banker has no agent at the place where the check is payable he sends it direct to the banker on whom it is drawn, which is considered due presentment. *Heywood v. Pickering*, L. R. 9 Q. B. 428. In *Bailey v. Bodenham*, 16 C. B. N. S. 288, 111 E. C. L. 288, 33 L. J. C. P. 252, 10 L. T. N. S. 422, *ERLE, C. J.*, and *BYLES, J.*, thought that sending a check by post to a banker might be a good presentment of a check; and in *Prideaux v. Criddle*, L. R. 4 Q. B. 461, *LUSH, J.*, was of opinion that a presentment through

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the post office was a reasonable mode of presentment. See also *Hare v. Henty*, 10 C. B. N. S. 65, 100 E. C. L. 65, 4 L. T. N. S. 363, 30 L. J. C. P. 302. Although these cases seem to countenance presentment by mail, yet there is no express adjudication that it is proper.

In *Farwell v. Curtis*, 7 Biss. (U. S.) 162, HOPKINS, J., says: "In *Morse on Banking*, page 334, he says it is a good presentment, and cites for his authority *Bailey v. Bodenham*, 16 C. B. N. S. 288, 111 E. C. L. 288, 33 L. J. C. P. 252, 10 L. T. N. S. 422. I have examined that case, and it gives some countenance to his assertion, but I think the point is not absolutely decided. In these days when such facilities are furnished by express companies for presentation at distant places there is no reason for adopting a less direct or effective mode to accomplish the object."

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v.

METROPOLITAN BANK.

(*Supreme Court of Minnesota, May 2, 1899.*)

Collections—Subagents.—For the purposes of collecting a check or draft deposited or left for collection, a bank must employ a suitable subagent, if an agent be necessary. It must not transmit checks or drafts directly to the bank or party by whom payment is to be made. No party upon whom rests the obligation to pay upon presentation can be deemed a suitable agent, in contemplation of law, to enforce, on behalf of another, a claim against itself.

Same—Same—Limiting Liability.—This rule is not affected by notice to a depositor that the bank attempting a collection limits its liability so that it acts as agent only for the depositor, and in forwarding items for collection is only bound to select agents who are responsible according to its judgment and means of knowledge, and assumes no risk or responsibility on account of the omission, negligence, or failure of such agents.

Same—Usage and Custom.*—Nor will an established usage and custom existing among banks to send checks or drafts payable by other banks, at distant points, to the drawee directly, and by mail, in case there is no other bank of good standing in the same town, excuse or justify such a course of procedure. In case of loss through the bad conduct of the drawee, the sender of the check or draft must bear it.

START, C. J., dissenting.

(Syllabus by the Court.)

APPEAL by plaintiff from Hennepin county district court. *Reversed.*

*See *Kershaw v. Ladd et al.* (Ore.), *ante*, p. 271 and notes.

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Penney & McMillan, for appellant.

John T. Baxter, for respondent.

COLLINS, J. On the admitted facts in this case, the only question necessarily to be determined, in our opinion, is whether defendant bank, doing business at Minneapolis, was negligent when it sent by mail, and for collection, the Norton check, directly to the bank at Mapleton, 117 miles distant, upon which bank the check was drawn; loss having resulted by reason of the adoption of this method of presenting the paper for payment. The defendant seeks to justify its procedure upon the ground that it had restricted its liability to its depositors, when collecting checks and drafts, by means of the notice printed upon its depositors' bank or pass books, of which notice plaintiff's secretary had actual knowledge; and also because of a well-settled usage and custom then prevailing in banks; and, further, because the same result would have ensued had another correspondent been selected. Case Stated.

1. Although the defendant had limited its liability so that when receiving checks or drafts for collection, or on deposit, it acted as an agent only, and in forwarding these items to other points, for collection, it was only bound to select agents who were responsible, according to its judgment and means of knowledge, and assumed no risk or responsibility on account of their omission or neglect or failure, defendant was obliged to exercise reasonable care and diligence in adopting a method of presenting the check in question to its drawee for payment, in selecting its agent. Now, can it be held that defendant exercised reasonable care when it sent the check by mail to the very party most interested against the payee and principal, and thus to place such principal entirely in the hands of its adversary. Norton had ample funds on deposit when he drew the check, and also when the check reached the drawee, presumably on July 31st, at the opening of business hours. It was important that it should speedily be presented for payment, in order to fix his liability in case of nonpayment. This was of the utmost im-

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portance to both payee and maker, in order that the interests of each might be protected. The interest of the drawee would naturally be to procrastinate, and possibly this would be its inclination. It seems to be settled by all of the authorities that, "for the purposes of collection, the collecting bank must employ a suitable subagent. It must not transmit its checks or bills directly to the bank or party by whom payment is to be made, with the request that remittances be made therefor. It is considered that no firm, bank, corporation, or individual can be deemed a suitable agent, in contemplation of law, to enforce in behalf of another a claim against itself." 1 Daniel, Neg. Inst. 328a; 3 Am. & Eng. Enc. Law (2d Ed.) 809; Drovers' Nat. Bank v. Anglo-American Packing & Provision Co., 117 Ill. 100, 7 N. E. 601; Bank v. Goodman, 109 Pa. St. 422, 2 Atl. 687; Wagner v. Crook, 167 Pa. St. 259, 31 Atl. 576; Bank v. Burns, 12 Colo. 539, 21 Pac. 714; Anderson v. Rogers, 53 Kan. 542, 36 Pac. 1067. See note to this last case in 27 Lawy. Rep. Ann. 248, in which the authorities are carefully considered. The truth of the remark as to the unsuitability of the drawee of a check as the agent selected to enforce its collection, and what may be expected if the practice is upheld, is well illustrated by the facts now before us. As before stated, the check must, in due course of mail, have reached Mapleton on the morning of July 31st. Had it been in the hands of a properly designated third party, it would have been presented and paid that day. The proceeds would, if promptly transmitted, have reached defendant on the morning of August 1st or 2d. Even if the payment had then been made, as it finally was, in a check upon the Mankato Bank, and defendant had pursued the course it did as to its collection, no loss would have resulted. But instead of accounting for the Norton check, so that defendant would receive the proceeds as early as August 2, the Mankato check was made out on August 4th, and came to defendant's hands the

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next day. With sufficient funds in its hands to meet the check, the Mapleton Bank postponed a remittance for three days, and then sent a check, which proved to be worthless when seasonably presented for payment.

2. We have stated the grounds upon which defendant attempts to justify. It did show that it was usual and customary for banks to send checks and drafts, payable by other banks at distant points, to the drawee direct, and by mail, provided Same—Usage and Custom. there was no other bank of good standing in the same town, while plaintiff was allowed to prove that an express company, whose business it was to collect and transmit money, had offices in both places. We fail to see what possible effect upon a case of this kind the fact that the drawee is the only bank in good standing in the town can have upon the duty of a bank which undertakes a collection. Any reason for such a course is equally as sound where there are two or more banks in the town as where there happens to be but one. While the syllabus of one of the cases cited in support of counsel's proposition (*Wheeled Scraper Co. v. Sadiak*, 50 Neb. 105, 69 N. W. 765), may justify him, the opinion does not. We cannot agree with counsel that the usage and custom here relied upon is a defense to the claim that defendant was negligent when forwarding this check to the Mapleton Bank for presentation and payment. As a general rule, usage and custom will not justify negligence. It may be admitted that such a course is frequently adopted, but it must be at the risk of the sender, who transmits the evidence of indebtedness upon which the right to demand payment depends, to the party who is to make the payment. Such a usage and custom is opposed to the policy of the law, unreasonable and invalid. It was so decided in *Drovers' Nat. Bank v. Anglo-American Packing & Provision Co.* and *Bank v. Goodman*, *supra*. Counsel for defendant has cited two cases from the English Law Reports and three from the New York Court of Appeals as authority upon this question. An examination of these cases will show that this exact question was not

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decided. See 27 Lawy. Rep. Ann. 248, note, *supra*.

3. Counsel for defendant also urges that plaintiff ought not to recover, because the result would have been the same had another correspondent been selected to present the check. This assumes that a third party would have waited until August 4th for payment, and then would have accepted a check upon the Mankato Bank as payment, which would have been transmitted to defendant August 5th. Such an assumption reflects seriously upon the ordinary methods of bank officers, and is without foundation. Primarily, the loss to plaintiff grew out of the fact that defendant negligently selected an unsuitable party to present the check, the payee, to compel payment, or, in case of refusal, to protect its rights, as against Norton, by due protest and notice of nonpayment. We need not discuss the further contention that payment of the Norton check could only be made in money. The order refusing a new trial is reversed, and, on the findings of fact, judgment must be ordered in plaintiff's favor in the court below, unless such court, in its discretion, grants a new trial.

START, C. J. I dissent. Under the undisputed evidence in this case, as to the universal custom of banks in collecting paper drawn upon a bank in good standing, which is the only bank at the place of its location, it cannot in my opinion be held, as a matter of law, negligence for the collecting bank to send the paper to the drawee bank for collection.

GUIGNON

v.

FIRST NAT. BANK OF HELENA *et al.**(Supreme Court of Montana, Feb. 6, 1899.)*

Collections—Whether Agent or Debtor.*—The defendant bank received from plaintiff a draft deposited by him with directions to

*See notes at end of case.

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collect and notify plaintiff and not for credit. A receiver was appointed for defendant before plaintiff was paid any part of the amount of the draft. Defendant was not indebted to its correspondent at the time the latter collected the draft, and did not become indebted to it subsequently, and the balance paid by the correspondent into the hands of the receiver exceeded the amount of the draft. *Held*, that the fact that plaintiff, when he deposited the draft, had an open account with defendant subject to check did not change the bank's relation to defendant from that of agent to that of debtor in regard to the draft, whether or not the amount of the draft was credited to plaintiff on defendant's books.

Insolvency of Bank—Trust Funds.—The amount of the draft collected by defendant's correspondent so far retained its identity as to be traceable to the hands of the receiver, and plaintiff has a preferential claim against the funds in the hands of the receiver for the amount collected on the draft.

Receiverships—Interest.*—It would be an injustice to other creditors to allow plaintiff interest for the time such amount was withheld by the receiver in order to obtain instructions as to his duty in the premises.

APPEAL by all parties from Lewis and Clarke county district court. *Affirmed*.

On August 8, 1896, plaintiff deposited with the First National Bank of Helena, Mont. (hereinafter called the "National Bank"), a draft for £400 on the Standard Bank of South Africa, of London, England, with instructions to collect it, and notify him. At this time, and thereafter until September 4, 1896, the National Bank was solvent, and doing a general banking business. Melville, Fickus & Co., bankers, of London, England (hereinafter designated as the "London Bank"), were the correspondents of the National Bank, and each house had current accounts with the other on its books. It was the custom, observed by them, for each bank, upon making a collection for the other, to credit it, as soon as made, upon its own books, and notify the other by letter of its action. The other would thereupon charge the collecting bank with the amount so collected. On August 8th, the plaintiff's draft was forwarded by the National Bank to the London Bank for collection in the usual course. The London Bank collected the draft on August 21st, and thereupon, on the same day, notified the National Bank by letter that it had credited

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the amount. On September 2d this letter was received, and on the same day the National Bank wrote the London Bank, approving its action, and notifying it that the National Bank had charged the amount to the London Bank. This charge was made that day. From August 21st until September 3d the two banks continued business as usual, making drafts upon each other, but the volume of this business does not appear, except as hereinafter stated. From August 21st to September 4th the National Bank did a large volume of general business, foreign and domestic, amounting to from \$75,000 to \$200,000 and upwards daily. On September 4th the National Bank failed to open its doors. On September 15th the defendant Wilson, in charge of it as examiner, called upon the London Bank for the credit on its books in favor of the National Bank. This balance, amounting to £475 14s. 4d., was paid to Wilson, the receiver, on October 26, 1896. It was larger than the balance shown by the books of the National Bank, because two drafts had been drawn by the National Bank against its London balance three or four days before suspension, and credited on its own books, but had not been paid by the London Bank. These, together, amounted to \$38.60. At the time the National Bank closed its doors it had on hand in cash \$4,343.72. The National Bank paid plaintiff no part of the amount of the draft, nor has he been paid any part of it by any one. The defendant Wilson was subsequently made receiver of the National Bank. On August 8th, and thereafter until the National Bank closed its doors, the plaintiff had an account with it open to check. Demand was made upon Wilson by the plaintiff herein for the amount collected from the London Bank, but this demand was denied. The court below found upon these facts that from and after August 21st until September 4th the London Bank had a continuous balance in favor of the National Bank upon its books of more than the amount of plaintiff's draft; that the relation of principal and agent between plaintiff and defendant bank had never been converted

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into the relation of debtor and creditor; that plaintiff had a preferential claim against the funds in the hands of the receiver because of the payment by the London Bank into his hands of the balance on its books; and that he was, therefore, entitled to recover from the receiver the sum of \$1,928, the full amount of his claim, without interest, because, if interest were allowed, it would be drawn from the general assets of the bank. From this judgment both parties appeal.

J. M. Clements, for plaintiff.

William Wallace, for defendants.

BRANTLY, C. J. (after stating the facts). The defendants assign as error that the facts found will not support the judgment. The plaintiff insists that he should be allowed interest. It will be seen from the statement of facts that the relation of principal and agent was established between the plaintiff and the National Bank by the transaction between them on August 8th, 1896. The draft was deposited with directions to collect and notify plaintiff, and not for credit. Though the plaintiff at that time had an open account with the bank subject to check, this fact is of no weight in view of the specific directions given by him. Furthermore, the record does not show that the defendant bank ever gave notice to the plaintiff, or credited him with the amount of the collection. In our view of this case, the mere act of crediting the amount to the plaintiff upon the books of the defendant bank would not change the relation of the bank to plaintiff from that of agent to that of debtor until it had actually received the money from the London Bank. The plaintiff could still pursue the funds in the hands of the latter so long as he could identify them. The title to the draft did not pass to the National Bank. We conclude also that the fact that its office was that of a mere collecting agent was communicated to its subagent in London, because we must presume, in the absence of proof to the contrary, that it obeyed its instructions, and transmitted the

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draft for collection as plaintiff's agent. The subagent bank must therefore have understood the nature of the transaction upon receipt of the draft. The right of the plaintiff to have his claim paid as a preferential one out of the fund collected by the receiver from the London Bank therefore depends upon whether the facts in the case show that the £400 collected by the London Bank so far retained its identity that it is traceable to the hands of the receiver. No money was remitted to the National Bank by the London Bank. Therefore the duties of the latter were not fully discharged up to the time the former closed its doors. The London Bank could only receive cash in payment of the draft, and it could only discharge its duty by remitting the cash collected to the National Bank. *Ward v. Smith*, 7 Wall. 452; *Levi v. Bank*, 5 Dill. 104, Fed. Cas. No. 8,289; *First Nat. Bank v. First Nat. Bank*, 76 Ind. 561; *Henderson v. O'Connor*, 106 Cal. 385, 39 Pac. 786; 2 Morse, Banks, § 568; *Evansville Bank v. German-American Bank*, 155 U. S. 556, 15 Sup. Ct. 221. It is true that if the National Bank had been indebted to the London Bank at the time the collection was made, and credit had been given by the latter to the former in settlement of this indebtedness before the former closed its doors, this would have been equivalent to a transmission of the funds to the National Bank. It would also have been a complete conversion of the money. *Bank v. Armstrong*, 148 U. S. 50, 13 Sup. Ct. 533; *Evansville Bank v. German-American Bank*, 155 U. S. 556, 15 Sup. Ct. 221; *Bank v. Beal*, 50 Fed. 355; 3 Am. & Eng. Enc. Law (2d Ed.) 818. But this was not the condition of things in this case. The National Bank was not indebted to the London Bank at the time of the collection of the draft. It did not become so indebted at any time afterwards. The collection was made on August 21st, and credited. The National Bank received notice on September 2d, and charged the London Bank with it. The National Bank closed its doors on September 4th. At this time there was charged to the London Bank £475 14s. 4d.,

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or its equivalent in American money, less two drafts, amounting to \$38.60, drawn and credited three or four days before that date. On October 26, 1896, the London Bank paid the receiver the full amount of this credit, because it had not paid the two drafts. Therefore there must have been a continuous balance upon the books of the London Bank from August 21st until it was collected by the receiver of £475 14s. 4d., for it does not appear that any other draft was drawn by either bank upon the other, or that any collection was made by either and charged or credited after August 21st. It therefore appears that the balance in the hands of the London Bank must necessarily have been made up of the amount of the collection upon plaintiff's draft with other money theretofore collected. The burden rests upon the plaintiff to establish his claim. *Bank v. Austin*, 48 Fed. 25; *Silk Co. v. Flanders* (Wis.) 58 N. W. 383; 5 *Thomp. Corp.* § 7104. In 2 *Pom. Eq. Jur.* § 1058, the rule is stated: "No change in the form of the trust property, effected by the trustee, will impede the rights of the beneficial owner to reach it and to compel its transfer, provided it can be identified as a distinct fund, and is not so mingled up with other moneys or property that it can no longer be specifically separated. * * * The existence of a constructive trust, as of a resulting one, must be proved by clear, unequivocal evidence." The facts found by the court below show that the plaintiff had successfully met the obligation cast upon him to show that his property, as a specific fund, passed into the hands of the receiver. The receiver has in his hands the money thus belonging to the plaintiff. The court below rendered judgment for the full amount of the sum collected, but allowed no interest. This we think correct. We have no statutory provision strictly applicable to such cases, and we think it inequitable that the assets in the hands of the receiver to which the general creditors must resort should be taken to pay interest on the sum so withheld by the receiver until he could be advised as to his duty in the premises. The discretion of the lower court was

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wisely exercised in this particular, and we shall not interfere. The judgment will therefore be affirmed. Affirmed.

HUNT and PIGOTT, JJ., concur.

NOTES.

Paper Indorsed for Collection.—If the language of the indorsement indicates that the assignor does not intend to pass the title to the paper, the relation of agency must of necessity continue until, by the consent of the assignor, either explicit or legitimately implied, the agency has ended by the establishment of the relation of debtor and creditor. Thus, where the indorsement is expressed to be "for collection," it has been held that the assignor has intended to retain his ownership in the paper.

United States.—Commercial Nat. Bank *v.* Armstrong, 148 U. S. 50; Bank of Metropolis *v.* Jersey City Nat. Bank, 22 Blatchf. (U. S.) 58; *In re* Armstrong, 33 Fed. Rep. 405; Circleville First Nat. Bank *v.* Monroe Bank, 33 Fed. Rep. 408; Levi *v.* National Bank, 5 Dill. (U. S.) 107; National Bank *v.* Merchants' Nat. Bank, 91 U. S. 92.

Georgia.—Central R. Co. *v.* Lynchburg First Nat. Bank, 73 Ga. 383.

Kansas.—Prescott *v.* Leonard, 32 Kan. 142.

Kentucky.—Armstrong *v.* Boyertown Nat. Bank, 90 Ky. 431.

Maryland.—Cecil Bank *v.* Farmers' Bank, 22 Md. 148; Tyson *v.* Western Nat. Bank, 77 Md. 412.

Massachusetts.—Manufacturers' Nat. Bank *v.* Continental Bank, 148 Mass. 553, 12 Am. St. Rep. 593; Freeman's Nat. Bank *v.* National Tube Works Co., 151 Mass. 413, 21 Am. St. Rep. 461.

Minnesota.—Rock County Nat. Bank *v.* Hollister, 21 Minn. 385; Merchants' Nat. Bank *v.* Hanson, 33 Minn. 40, 53 Am. Rep. 5; Syracuse Third Nat. Bank *v.* Clark, 23 Minn. 263.

Mississippi.—Ryan *v.* Paine, 66 Miss. 678; Kinney *v.* Paine, 68 Miss. 258.

Missouri.—Bury *v.* Woods, 17 Mo. App. 245; Millikin *v.* Shapleigh, 36 Mo. 596, 88 Am. Dec. 171; Mechanics' Bank *v.* Valley Packing Co., 70 Mo. 643.

New Jersey.—Hoffman *v.* Jersey City First Nat. Bank, 46 N. J. L. 604.

New York.—National Butchers, etc., Bank *v.* Hubbell, 117 N. Y. 384, 15 Am. St. Rep. 515.

Ohio.—Jones *v.* Kilbreth, 49 Ohio St. 401.

Rhode Island.—Blaine *v.* Bourne, 11 R. I. 119, 23 Am. Rep. 429.

Texas.—City Bank *v.* Weiss, 67 Tex. 331, 60 Am. Rep. 29.

As to Effect of Crediting Paper as Cash, see Taft *v.* Quinsigamond Nat. Bank (Mass.), *ante*, p. 99 and *note*, p. 102.

Insolvency of National Bank—Interest on Claims Pending Administration.—Under the National Bank Act if a sufficient fund is realized from the assets to pay all claims against the bank, and to leave a surplus, the comptroller ought to allow interest on the claims, during the period of administration, before appropriating the surplus to the shareholders of the bank. Chemical Nat. Bank *v.* Bailey, 12 Blatchf. (U. S.) 480, 1 Nat. Bank Cas. 260.

Riverside Bank v. Woodhaven Junction Land Co

RIVERSIDE BANK

v.

WOODHAVEN JUNCTION LAND CO. *et al.*

(*Supreme Court, Appellate Division, First Department, Nov. 11, 1898.*)

Deposited Checks—Rights of Bona Fide Holders.*—A bank receiving from a depositor, in the usual course of business, a check drawn to his order, before its maturity, is, in the absence of evidence to the contrary, entitled to presume that it was given for a valuable consideration, and if, under such circumstances, the bank practically purchases such check by paying money on the faith of the first mentioned check, on a check drawn by such depositor the drawer of the first mentioned check is not entitled to show equities existing between the drawer and drawee at the date of the check to defeat the bank's title thereto. And in an action on the check against the drawer, the fact that the bank, after paying for the check, charged the amount thereof back to such depositor is immaterial.

APPEAL by defendant from trial term. *Affirmed.*

Argued before VAN BRUNT, P. J., and McLAUGHLIN, PATTERSON, O'BRIEN, and INGRAHAM, JJ.

Louis C. Whiton, for appellant.

Lyman L. Settel, for respondent.

PATTERSON, J. This is an appeal by the defendant land company from a judgment entered upon a verdict directed by the court on the trial of this action. A single question of law is involved. The material facts established on the trial are the following: One Andrews was a depositor in the Riverside Bank. On the 25th day of May, 1897, he deposited with that bank a check for the sum of \$450, drawn by the treasurer of the Woodhaven Junction Land Company to his (Andrews') order. The check was indorsed by Andrews, and deposited without any limitation; or, in other words, it became part of Andrews' general deposit account. On

*See notes at end of case.

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the day of that deposit, and before it was actually made, Andrews had a balance of \$85 standing to his credit with the plaintiff. Immediately after the \$450 check was deposited, Andrews presented his own check for \$500 drawn upon the plaintiff, and on it procured that amount to be paid to him by the paying teller of the bank. The \$450 check was drawn on the Bank of Jamaica. On the same day, the plaintiff sent the check to the Queens County Bank, through which it made its Long Island collections. It was presented at the Jamaica Bank on the 26th day of May, 1897, and was returned protested, payment having been stopped. Some time subsequently, the plaintiff charged back to Andrews the amount of the dishonored check. Shortly afterwards this action was begun against the land company and Andrews to recover its amount. The defendant land company admits the making of its check and its delivery to Andrews, but sets up that the same was given without consideration, or for a consideration that failed, namely, that it was given to Andrews in exchange for a certain other check of one Walter Fox, and upon a representation made by Andrews that the Fox check was good, but it avers that said check was in fact worthless. The land company therefore has set up, as against the title of the plaintiff and its right to recover, certain equities existing between it and Andrews, which would render the check unenforceable in the hands of Andrews, and the claim is made that it is also nonenforceable by the plaintiff.

It is the settled law of this state that, as to a general deposit account of a dealer with a bank, the relation existing between the depositor and the bank is simply that of creditor and debtor. *First Nat. Bank of Lyons v. Ocean Nat. Bank*, 60 N. Y. 278; *Ætna Nat. Bank v. Fourth Nat. Bank*, 46 N. Y. 82.

The title to money, checks, or drafts deposited by a customer passes to the bank. The relation of a bank to negotiable drafts or checks under such circumstances is very plainly stated in *Craigie v. Hadley*, 99 N. Y. 133, and it is that, upon a deposit being made by a cus-

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tomers in a bank in the ordinary course of business of money or drafts or checks received or credited as money, the title to the money, drafts, or checks is immediately vested in and becomes the property of the bank; and it is stated that that proposition is not open to question. As the court in that case says:

"The transaction, in legal effect, is a transfer of the money or drafts or checks, as the case may be, by the customer to the bank, upon an implied contract on the part of the latter to repay the amount of the deposit upon the checks of the depositor. The bank acquires title to the money, drafts, or checks on an implied agreement to pay the equivalent consideration when called upon by the depositor in the usual course of business."

The question, therefore, before the court, was whether the defendant land company could show equities to defeat the plaintiff's title. The check was a negotiable instrument. The party primarily liable upon it was the land company. The plaintiff was entitled to rely upon the presumption that it had been issued for a valuable consideration. Laws 1897, c. 612, § 50. The plaintiff was a holder for value. It had taken a negotiable check of the land company, complete and regular upon its face, and in the usual course of business, and gave value for it; namely, at the time the deposit was made, it paid to Andrews his check of \$500, \$415 of which much necessarily have been paid from the credit given on the deposit of the \$450 check. It was taken before maturity, for a check is not, strictly speaking, due until it is demanded within a reasonable time. *Cruger v. Armstrong*, 3 Johns. Cas. 9; Story, Prom. Notes (7th Ed.) 686. It was taken in good faith, and it is not claimed that, at the time it was negotiated, the plaintiff had notice of any equity existing in favor of the drawer, or of any infirmity in the check, or defect of title or right in the person negotiating it. The proof establishing all these considerations being in the case, the defendant land company was not in a position to resist the plaintiff's claim. It is entirely immaterial

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that, by a book-keeping entry, the plaintiff subsequently charged the amount of the check back to Andrews. Its cause of action arising on the check was against both the drawer and the indorser, and the claim against the drawer was not surrendered, nor was it released because of the entry referred to.

The judgment appealed from should be affirmed, with costs. All concur.

NOTES.

Negotiable Instruments—Absence or Failure of Consideration—Bona Fide Holders.—In the case of a negotiable instrument, the absence or failure of consideration is no defense against a *bona fide* holder for value before maturity. *Rahm v. Bridge Co.*, 16 Kans. 530; *Scott v. Seely*, 27 La. Ann. 95; *Hawkins v. Neal*, 60 Miss. 256; *Matthews v. Crosby*, 56 N. H. 21; *Polhemus v. Ann Arbor Sav. Bank*, 27 Mich. 44; *Daniels v. Wilson*, 21 Minn. 530; *Harris v. Bradley*, 7 Yerg. (Tenn.) 310; *Chicopee Bank v. Chapin*, 8 Metc. (Mass.) 40.

Same—Credited as Cash—Withdrawal of Deposit before Notice to Bank—Ownership of Paper.—Although the mere crediting of an account by a bank to its depositor, where the effect of the credit is only to increase the balance due the depositor, is not a payment and does not make the bank a purchaser for value, yet if, before receiving notice of any infirmity in the paper, it pays out on the checks of the depositor the full amount due him, including the discount, it thereby becomes a purchaser for value so as to be entitled to full protection. *Fox v. Kansas City Bank*, 30 Kan. 441; *Dreilling v. Battle Creek First Nat. Bank*, 43 Kan. 197, 19 Am. St. Rep. 126.

FIRST NAT. BANK OF MANNING

v.

GERMAN BANK OF CARROLL COUNTY *et al.*

(*Supreme Court of Iowa, Feb. 6, 1899.*)

Notice of Protest—Liability for Negligence of Notary.*—A draft received by the defendant bank for collection having been presented to the drawee, and payment refused, was placed in the hands of a notary public, who was also defendant's cashier, with instructions to protest for non-payment. It was not contended that defendant was negligent in selecting such notary. *Held*, that the bank was

*See notes at end of case.

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not chargeable with the notary's negligence in failing to promptly send notice of protest.

Same.—A bank is not chargeable with negligence because it entrusts to a notary the duty of sending to an indorser notice of dishonor.

APPEAL by plaintiff from Carroll county district court.
Affirmed.

F. M. Powers, for appellant.

M. W. Beach, for appellee.

LADD, J. That the draft was sent to the defendant bank for collection, and was presented to the drawee for payment, in apt time, admits of no doubt. *Hamlin v. Simpson* (Iowa) 74 N. W. 906. The exercise of prudence in the selection of a notary public is not questioned. The very gist of the action is that the defendant is chargeable with the negligence of that officer in failing to learn of Farneman's residence, and notify him of the dishonor of the draft. But a notary is a public officer, appointed by the chief magistrate of the state, is under bond for the faithful performance of his duties as such, and keeps a public record of his acts, certified copies of which may be received in evidence. Code, § 373 *et seq.* He is not a mere agent of the bank, but a public officer sworn to properly discharge his duties to the public. As such officer, the bank may not control his acts, nor dictate in what manner he shall perform his duties. If guilty of malfeasance in the performance of an official act, he, and not the bank, is responsible. That this notary was also an employee of the bank can make no difference. When acting as such officer, he was not discharging his duties as servant. The positions were distinct, and his acts in the capacity of an officer of the state had no connection with the services he owed the bank. Again, the defendant was a mere agent for the collection of the draft, and, owing to its dishonor, deposited it with a notary for protest. "A subagent is accountable, ordinarily, only to his superior agent, when employed without the assent or direction of the principal. But, if he be employed with the express or implied assent of the

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principal, the superior agent will not be responsible for his acts. There is, in such a case, a privity between the subagent and the principal, who must, therefore, seek a remedy directly against the subagent for his negligence or misconduct." *Guelich v. Bank*, 56 Iowa, 435, 9 N. W. 328. In making such collections it is usual to employ a notary, and, in forwarding the draft, there was an implied direction to do so, if necessary. See *Mount v. Bank*, 37 Iowa, 457. If the defendant exercised prudence in making the selection, its responsibility ended. This is all it could have done had the draft been its own, and surely it will not be held to a higher degree of care when acting for others. *Baldwin v. Bank*, 1 La. Ann. 13; *Bank v. Howell*, 8 Md. 530; *Hyde v. Bank*, 17 La. 560; *Tiernan v. Bank*, 7 How. (Miss.) 648; *Bellemire v. Bank*, 4 Whart. 105; *Britton v. Niccolls*, 104 U. S. 766; *Warren Bank v. Suffolk Bank*, 10 Cush. 582; *Stacy v. Bank*, 12 Wis. 629; *May v. Jones*, 88 Ga. 308, 14 S. E. 552; *Agricultural Bank v. Commercial Bank*, 7 Smedes & M. 592; *Bank v. Butler*, 41 Ohio St. 519; *Mechem, Ag.* § 514. While there is a conflict in opinion, the rule announced is sustained by the weight of authority and the better reason. See collection of cases in 3 Am. & Eng. Enc. Law (2d Ed.) 808, and note to *Ishan v. Post* (N. Y. App). 38 Am. St. Rep. 775 (s. c. 35 N. E. 1084); also *Allen v. Bank*, 22 Wend. 215.

The distinction between a foreign and an inland bill of exchange should not be overlooked. To charge the makers and indorsers, the former must be protested. Not so with the latter. All that is required is a demand, and, on refusal to pay, notice of dishonor, in order to fix liability of the indorsers of an inland bill; and these may be made and given by the holder, or any one acting in his behalf. By the law merchant, giving notice of dishonor is no part of notary's official duty, and when he does so he is merely acting as agent of the holder. *Swayze v. Britton*, 17 Kan. 625; *Allen v. Bank*, 22 Wend. 215; *Daniel, Neg. Inst.* § 960. But it is customary for him, in protesting a bill, to

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give the proper notice of dishonor. Prof. Not. §§ 142, 143. And in many of the states the law merchant is so modified that he is required to give notice. Formerly his certificate might not be received as proof of the protest of an inland bill. Case *v.* Heffner, 10 Ohio, 180. By section 378 of the Code, "every notary public is required to keep a true record of all notices given or sent by him, with the time and manner in which the same were given or sent and the names of all the parties to whom the same were given or sent, with a copy of the instrument in relation to which the notice is served and of the notice itself." Section 379 requires his record and official papers to be filed with the clerk of the court upon his death, resignation, or removal, and provides for certified copies. Very evidently this is for the purpose of perpetuating proof of the notice as well as of the demand and protest. Section 3054 permits a notary "to inform the indorser or any party to be charged, if in the same town or township, by notice deposited in the nearest post office to the parties to be charged, on the day of the demand, and no other notice shall be necessary to charge such party." The advantage in having an inland bill protested by a notary, and notice given by him, is that the evidence is thus perpetuated; and notice to indorsers living in the same town or township may be given by mail, instead of personally. These statutes clearly recognize giving notice as a part of the notary's official duty. Indeed, the term "protest" is ordinarily used as including the entire proceeding necessary to charge indorsers. Notaries are nearly always resorted to for this work, and the owner of the draft may be assumed to have intended this course to be pursued. As said in *Tiernam v. Bank*: "No agent could have been selected with more propriety for the performance of this duty than one whose profession and office were calculated to fit him peculiarly for the discharge. They are almost universally resorted to for the purpose. We cannot perceive, therefore, that the bank was wanting either in the degree of skill or diligence which is

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required under such circumstances to exempt an agent from liability." Baldwin *v.* Bank, *supra*; Hyde *v.* Bank, *supra*; Swedes *v.* Bank, 20 Johns. 384; Bellemire *v.* Bank, 4 Whart. 105, 1 Miles, 173; Bank *v.* Howell, *supra*; Fisher *v.* Bank, 7 Blackf. 610; Turner *v.* Rogers, 8 Ind. 139. Bank *v.* Ober (Kan. Sup.) 3 Pac. 324, is based on the finding that the statutes of Kansas do not authorize the notary to give notice.

Our conclusion rests on statutes allowing a notary, as such, to perform this duty. Surely, the bank acted prudently in intrusting to a public officer the doing of that which was incumbent on him as an officer of the law to do. Affirmed.

Same.

NOTES.

Liability of Bank for Conduct of Notary—Prevailing Doctrine.—In regard to the liability of the collecting bank for the manner in which a notary to whom bills or notes are delivered for presentment and protest discharges his duty, there is a conflict of opinion. The prevailing doctrine is that the bank is not liable for a default of the notary if it has exercised due care in selecting a reputable notary, or has placed the instrument in the hands of the notary whom it regularly employs to perform this service. Britton *v.* Nicolls, 104 U. S. 757; May *v.* Jones, 88 Ga. 308, 30 Am. St. Rep. 154; Citizens' Bank *v.* Howell, 8 Md. 530, 63 Am. Dec. 714; Warren Bank *v.* Suffolk Bank, 10 Cush. (Mass.) 582; Tiernan *v.* Commercial Bank, 7 How. (Miss.) 648, 40 Am. Dec. 83; Agricultural Bank *v.* Commercial Bank, 7 Smed. & M. (Miss.) 592; Bowling *v.* Arthur, 34 Miss. 41; Gallipolis First Nat. Bank *v.* Butler, 41 Ohio St. 519, 52 Am. Rep. 94; Bellemire *v.* U. S. Bank, 4 Whart. (Pa.) 105, 1 Miles (Pa.) 173, 33 Am. Dec. 46; Stacy *v.* Dane County Bank, 12 Wis. 629.

The reason for this doctrine is thus explained by LUMPKIN, J., in May *v.* Jones, 88 Ga. 308, 33 Am. St. Rep. 154; "The notary is not a mere agent or servant of the bank, but is a public officer, sworn to discharge his duties properly. He is under a higher control than that of a private principal. He owes duties to the public which must be the supreme law of his conduct. Consequently, when he acts in his official capacity, the bank has no longer control over him, and cannot direct how his duties shall be done. If he is guilty of misfeasance in the performance of an official act, the bank is not liable. * * * That the notary is also an employee and agent of the bank does not alter the case. There is still a sharp dividing line between his duties as agent and his duties as a public officer. When his public service comes into play, his private service is, for the time, suspended."

In an action against a bank for negligence in not making necessary demand and protest of a note left with it for collection, the

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bank, by showing the delivery of the note to a notary public for demand and protest in due time, is *prima facie* exonerated from liability. It is not sufficient for the plaintiff to prove in general terms that the notary was a man of dissipated habits. To rebut such *prima facie* case, proof must be offered that the notary was drunk at the time the note was given to him, or that his habits were so universally intemperate as to disqualify him for the discharge of an official act. *Agricultural Bank v. Commercial Bank*, 7 Smed. & M. (Miss.) 592.

In Louisiana the established doctrine is that where a bank in which a note has been deposited for collection, in case of nonpayment, places it for protest in the hands of the notary to whom its own business is uniformly intrusted, it will not be responsible for the failure of the notary to protest the note, or to notify the proper parties. Having shown the same care and attention in the management of the business intrusted to it which men of common prudence bestow on their own affairs, it is not answerable for the neglect of the notary. *Baldwin v. State Bank*, 1 La. Ann. 13, 45 Am. Dec. 72; *Hyde v. Planters' Bank*, 17 La. 560, 36 Am. Dec. 621; *Frazier v. New Orleans Gas Light, etc., Co.*, 2 Rob. (La.) 296.

In *Baldwin v. State Bank*, 1 La. Ann. 13, 45 Am. Dec. 72, the court, by SLIDELL, J., said: "The plaintiff attempts to distinguish the present from those cases [*Hyde v. Planters' Bank*, 17 La. 560, 36 Am. Dec. 621; *Frazier v. New Orleans Gas Light, etc., Co.*, 2 Rob. (La.) 296] because there the agency was governed by the law of Mississippi, and he urges that in that state a notary gives a bond to the state which is available to any party injured. It is true that this provision of the law of that state was adverted to in the *Planters' Bank* case, but, after a careful perusal of the opinion of the court, we do not consider it as put upon that narrow ground, nor that the circumstance of the official bond was an essential element in the decision."

Some older cases in this state present a doctrine which is apparently somewhat in conflict with that of the cases just cited. In *Montillet v. U. S. Bank*, 1 Martin N. S. (La.) 365, the defendant was sued to recover damages for negligence in collecting a note, and it appeared that the notary employed by the bank to protest the instrument was guilty of negligence in notifying the indorser, who was thereby discharged. It was held that the bank was responsible; that the notary, in undertaking to give notice, did so as a private individual, and that it constituted no part of his official duties. *Miranda v. City Bank*, 6 La. 740, 26 Am. Dec. 493, was similar to and was decided upon the authority of the case last cited.

Same—Minority Doctrine.—In some states it is held, however, that the notary is the agent of the bank, and that the bank is liable for his default. *Davey v. Jones*, 42 N. J. L. 28, 36 Am. Rep. 505; *Allen v. Merchants' Bank*, 22 Wend. (N. Y.) 215, 34 Am. Dec. 289; *Ayrault v. Pacific Bank*, 47 N. Y. 570, 7 Am. Rep. 489; *Mead v. Engs*, 5 Cow. (N. Y.) 303; *Thompson v. State Bank*, 3 Hill L. (S. Car.) 77, 30 Am. Dec. 354.

In *Smedes v. Utica Bank*, 20 Johns. (N. Y.) 372, the court expressed a doubt whether, if the bank selected a competent notary, it would be liable for his neglect, since notaries are officers appointed by the state, and confidence is placed in them by the government.

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But in *Allen v. Merchants' Bank*, 22 Wend. (N. Y.) 215, 34 Am. Dec. 289, it was held that the notary, at least when not acting in a strictly official capacity, occupies the position of an agent to whose discretion his employers trust, and for whose neglect they are answerable. In delivering the opinion of the court, Senator Verplanck said: "Notaries are commissioned public officers, whose office gives to their notarial attestation a peculiar authority and effect according to the law or negotiable paper. This attestation it is their duty to grant when directed and required. But they are with us, also, in practice the agents of the several banks in whose employ (in the phrase used in evidence here) they may be. As such agents, it appears that business connected with their official character, yet still not strictly official, is confided to them; such as sending notices of nonpayment where no protest is required."

In *Gerhardt v. Boatman's Sav. Inst.*, 38 Mo. 60, 90 Am. Dec. 407, the notary, whose default had occasioned the suit, had been regularly appointed by the defendant bank by the year, and had been required to give bond for the faithful discharge of his duties. Upon this showing the court held that the defendant bank was liable, the notary being the agent of the defendant, and not an independent officer in the execution of a duty devolved upon him by law. To the same effect is *Wood River Bank v. Omaha First Nat. Bank*, 36 Neb. 744. See also *Thompson v. State Bank*, 3 Hill L. (S. Car.) 77, 30 Am. Dec. 354. And compare *Baldwin v. State Bank*, 1 La. Ann. 13, 45 Am. Dec. 72.

LINTON, TAX COLLECTOR,

v.

CHILDS.

(Supreme Court of Georgia, Feb. 10, 1899.)

National Bank Presidents—Personal Taxation—Constitutionality of Statute.*—The words of an act, which imposes a tax on the presidents "of each of the banks of the state" include the presidents of all banks doing business in the state. Such an act, however, is inoperative when sought to be applied to the presidents of national banking associations organized under the acts of congress, because such associations are instrumentalities created by congress, and designed to aid in the administration of an important branch of the public service. The business of such an association not being subject to be taxed by the laws of a state, and the president being an officer prescribed by the act of congress, through whom, in part, the business of the association must be carried on, a tax on the president, as such, would tend to retard and burden the operation of the law which provides for the creation and maintenance of such institutions.

(Syllabus by the Court.)

*See note at end of case.

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ERROR by plaintiff from Clarke county superior court. *Affirmed.*

C. H. Brund, Sol. Gen., and *J. M. Terrell*, Atty. Gen., for plaintiff in error.

John J. Strickland and *W. A. Wimbish*, for defendant in error.

LITTLE, J. The payment of the tax sought to be collected was resisted by the president of a national bank, for two reasons: First, that the legislature, by the use of the words which imposed the tax, did not intend to include presidents of national banks; second, that, if the legislature, by the words used, meant to impose a tax on presidents of national banks, the act was inoperative and void, because the state has no power to limit or obstruct the business of national banks, which are agencies of the federal government, and the imposition of a tax by the state on the president of a national bank would so operate. If either of these contentions be true, the tax sought to be collected from the defendant in error would be illegal. It is axiomatic that the power which seeks to collect a tax must show clear authority to do so. In this case, the authority shown is that of the state, a power sovereign in its character, and, unless forbidden by its own constitution, or an interference with an institution created by the federal government, called into existence for the benefit of the people at large, such power manifestly exists. The words of the act impose a tax of \$10 on the president "of each of the banks of the state." Official cognizance will be taken of the fact that there are two classes of banks which are located, operated, and doing business in the state, which have presidents, to wit, banks organized under the laws of this state, and banking associations created under the laws of the United States, which are private associations, authorized by congress, for the joint purposes of convenience and profit to the holders of United States bonds, and of furnishing the public with a convenient and uniform circulating medium. 16 Am. & Eng. Enc. Law, p.

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144, citing *Van Allen v. Assessors*, 3 Wall. 573 ; *Stetson v. City of Bangor*, 56 Me. 274 ; *Mercantile Bank v. City of New York*, 121 U. S. 138, 7 Sup. Ct. 826 ; *Flint v. Board*, 99 Mass. 141. There can be no question but that the words employed in the act which imposes the tax are broad enough to cover the presidents of such banks as have been organized under the laws of this state, because such are certainly banks of the state. Such institutions not only do business in the state, are protected by the authority of the state, and have access to the courts of the state, but are created by its laws, and their business is regulated by legislative enactments of the state. But it is not to be held that, while organized under the laws of the general government, national banking associations are foreign corporations, nor, in their capacity as persons, are aliens ; on the contrary, such associations are established and located, under the law of their creation, at a certain given locality in one of the states or other political divisions of the United States, and such place or point is distinctly named in the certificate of organization (*Bank v. Baack*, 1 Thomp. Nat. Bank Cas. 161, 2 App. [U. S.] 232, 8 Blatchf. 137, Fed. Cas. No. 9,052 ; *Main v. Bank*, 6 Biss. 26, Fed. Cas. No. 8,976), and, for jurisdictional purposes, are to be treated as citizens of the state within which they are located. Such associations are not otherwise citizens of the United States. *Bank v. Baack*, *supra* ; *Gassies v. Ballou*, 6 Pet. 761. Indeed, the business of a national banking association must be done at this designated location, and it cannot lawfully do business, such as cashing checks drawn upon it, elsewhere. *Armstrong v. Bank*, 38 Fed. 883. So that, equally with state banks, national banks are citizens of the state in which they are located, in the sense that corporations are citizens, and this result follows from the act which created such associations. The able counsel for the defendant in error, who furnished us with a concise and comprehensive brief on the points involved, refers to the language employed in the paragraph of the act of the general assembly where a tax

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is imposed on the "president of each of the express, telegraph, telephone, electric light, and gas companies doing business in this state." He argues from such language, used in the same paragraph which imposes a tax on the president of banks, that if the legislature had intended to impose a tax on presidents of national banks it would have used the words "president of each bank doing business in this state." Such words are, of course, more comprehensive in their nature, but are they needed to include presidents of national banks? If, as we have seen, such banks are to be treated as citizens of the state in which they are located, then there are no banks doing business in Georgia which can properly be denominated foreign corporations. While not domestic corporations, the act which creates national banking associations establishes for them one situs, one domicile; and, while they operate under laws independent of the state, it is only for the purpose of carrying out the objects of their organization within the state in which they are located. It is a matter of common knowledge that, in Georgia, there are railroad, telegraph, telephone, express, and gas companies, doing business, which are not citizens, but foreign corporations. The domicile of such corporations is in another state, and they are here merely by the comity which exists between the states. There might be some question if the act which sought to include such corporations should impose a tax on "the presidents of the railroads of this state," because, while they do business in this state, they are citizens of another state, and carry on business here simply by permission. JUDGE COOLEY, referring to the construction of tax laws, says: "The underlying principle of all construction is that the intent of the legislature should be sought in the words employed to express it, and that, when found, it should be made to govern, not only in all proceedings which are had under the law, but in all judicial controversies which bring those proceedings under review." Cooley, *Tax'n* (2d Ed.) p. 264. We cannot doubt but that the general assembly,

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by the use of the words quoted, intended to impose a tax on the presidents of national banks, as well as state banks.

The inquiry then arises whether the general assembly has power to impose a tax on the presidents of national banks doing business in this state. "Taxes are the enforced proportional contributions from persons and property levied by the state, by virtue of its sovereignty, for the support of government and for all public need. Cooley, Tax'n (2d Ed.) p. 1. And, further, as to the subjects of taxation, the same eminent authority declares: "Everything to which the legislative power extends may be the subject of taxation, whether it be person, or property, or position, or franchise, or privilege, or occupation, or right." *Id.* p. 5. The tax in question is, by the statute, imposed on the presidents of each of the banks of the state. The section of the act which imposes the tax lays it also upon "every practitioner of law, medicine or dentistry, agents negotiating loans," etc., from which it is evident that it is imposed as an occupation tax. As a rule, there can be no question of the right of the general assembly to impose a tax on the occupation of persons. Sometimes it is a "license fee," and is imposed in the exercise of the police power of the state, and used for regulating certain businesses; or it may be imposed directly as a tax to raise revenue for the support of the government. McCoy, J., delivering the opinion of this court in the case of Burch v. Mayor, etc., 42 Ga. 596, says: "We can see no reason, in the nature of things, why a tax may not be laid upon the land and upon the crop, on the horse and on the work of the horse, on the man and on the income of the man, unless there be some special limitation of this power by the constitution." Under our constitution, the only qualification pertaining to the levy of taxes on occupation is that, while the taxing power may not tax all classes of occupations, yet, when one class is taxed, all in that class must be taxed alike, in order to secure the uniformity required by the con-

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stitution. *Mayor v. Long*, 54 Ga. 330; *Cutliff v. Mayor*, 60 Ga. 597. So that, assuming it was the purpose of the general assembly to include presidents of all banks doing business in this state in the imposition of the tax, the question is, do the laws of the United States so limit the power of the general assembly to tax national banking associations as to exclude presidents of national banking associations from the operation of a statute which imposes an occupation tax on such officers? It is not necessary to refer to the method of organizing national banking associations. Their creation, powers, and duties are the subjects of United States statutes, accessible to all. Without doing so, it is sufficient to say that such banks, when duly organized, are "instruments designed to be used to aid the government in the administration of an important branch of the public service. * * * Being such means, brought into existence for this purpose, and intended to be so employed, the states can exercise no control over them, nor in any wise affect their operation, except in so far as congress may see proper to permit." *Bank v. Dearing*, 91 U. S. 29. In a leading decision of the supreme court of the United States, which has never been modified, so far as the principle we are discussing is concerned, it is said by the court that the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operation of a constitutional law enacted by congress to carry into execution the powers vested in the general government. *McCullough v. Maryland*, 4 Wheat. 316. See, also, *Osborne v. Bank*, 9 Wheat. 738; *Bank Tax Case*, 2 Wall. 200; *Bradley v. People*, 4 Wall. 459; *Tappan v. Bank*, 19 Wall. 490; *Bank of Commerce v. New York City*, 2 Black, 620. In direct harmony with this principle, of the correctness of which there can be no doubt, this court, in the case of *Mayor, etc., of Macon, v. First Nat. Bank of Macon*, 59 Ga. 648, ruled that: "While the property owned by the bank may be taxed by state authority, and the shares owned by the stockholders may be also

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taxed, the business of the bank—its right to operate and do banking business—cannot be taxed by the states.

* * * The distinction between the right to tax property and that to tax business in cases of agencies working under federal authority is well settled, we think," etc. Again, in the case of *Johnston v. Mayor*, 62 Ga. 650, in discussing the right of the city of Macon to tax the businesses of state and national banks, this court, in reference to the latter, said: "It could not tax the business of the national bank, because it was chartered by congress, and the government of the United States used its business for their fiscal operations, or could use it, and any interference by state taxation might, if allowed at all, amount to prohibition, by making the tax so high as to be prohibitory," etc.

Considering, then, the propositions that a state cannot, by taxation or other legislation, impair or destroy the efficiency of the operation of any federal agency created by a constitutional act of congress to further and serve the purposes of the government of the United States; that national banking associations are one of such agencies, whose business cannot be taxed by the state,—as fully established, it may be well to inquire into the nature of the tax imposed. It was urged by the attorney general that the tax contemplated by the statute was imposed in the exercise of the police power of the state; that such tax is a personal one; and that the bank president is not relieved because of the fact that the bank is a federal agency. And he cites *Bank v. Chipman*, 164 U. S. 347, 17 Sup. Ct. 85. We are of the opinion that the imposition of this tax was not made in the exercise of the police power, which, in the opinion of some authors, is founded on the law of necessity, and which is defined by Blackstone to be the due regulation and domestic order of the kingdom, whereby individuals, like members of a well-regulated and well-governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood, and good manners. 4 Bl. Comm. 162. It extends to the protection of lives, limbs, health, com-

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fort, and quiet of all persons, and the protection of all property within the state. Thorpe v. Railroad Co., 27 Vt. 149. While it is true that revenue may be raised by an act passed in the legitimate exercise of the police power, it is our opinion that, in so far as the act in question is concerned, it is a pure revenue law, enacted to procure, in part, funds for the support of the government, passed in the legitimate exercise of the taxing power of the state, and that it applies in all cases where the particular subject is not, by some controlling law, exempt. Nor do we think the case cited supports the contention of the plaintiff in error; but the reasoning in that case leads, logically, to a conclusion in harmony with decisions we have previously cited. In reference to national banking associations, the court, in the case cited, says: "As long since settled, in cases already referred to, the purpose and object of congress in enacting the national bank law was to leave such banks, as to their contracts in general, under the operation of the state law, and thereby invest them, as federal agencies, with local strength, while at the same time preserving them from undue interference, whenever congress, within the limits of its constitutional authority, has expressly so directed, or wherever such state interference frustrates the lawful purpose of congress, or impairs the efficiency of the banks to discharge the duties imposed upon them by the law of the United States." By the provisions of section 5145 of the Revised Statutes of the United States, the affairs of national banking associations must be managed by directors chosen by the stockholders; and by section 5150, *Id.*, one of the directors, to be chosen by the board, shall be president of the board. So far as direct authority is concerned, the president of a national bank, or, rather, of its board of directors, is only authorized, in terms, to preside at the meetings of the board of directors, and to have charge of the litigation of the bank; otherwise, his power, as given by the acts of congress, is the same as that of any other directors. See 1 Morse, Banks, §§ 143, 144;

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Gibson *v.* Goldthwaite, 7 Ala. 281. Under the act of congress, the business of a national bank is to be managed, controlled, and carried on by the board of directors. A member of this board is the president. Without such officers, the corporation could not carry on business. In other words, the directors, including the president, are the instruments designated by the act of congress to carry on the business of the banking association, which is itself one of the instruments called into being for the purpose of performing a part in the business of the government. Now, if the business of the bank cannot lawfully be taxed, nor any tax imposed by a state which would frustrate the lawful purpose of the act of congress, or which would impair the efficiency of the bank to discharge the duties imposed upon it by law, then it would seem to follow that a tax on the directors, or a director, or the president, through whom, alone, such business could be carried on, would be equally obnoxious. If a state could lawfully impose a license or occupation tax on a director, or the president, who is a director, it is a tax on the instrumentality or agency declared by congress to be the only power through whom the business of the bank could be carried on. Without these officers no national bank could transact the business for which it was organized. If the state cannot tax the business of the bank, because it is a necessary creation by the general government for its own use, by what process of reasoning can the right be claimed to tax the instruments which alone can lawfully carry on such business,—not as individuals, but as officers of the bank? The tax here is laid, not upon the individual as an individual, but upon him as an officer of a national bank. If such a tax could be lawfully laid, it might be laid to an amount which might deter some, if not all, of such officers within the state from performing the duties devolving upon them; and if they should be prevented or deterred by such tax from performing the duties contemplated by the act of congress, necessarily, the business of the bank would be retarded,—nay, might be destroyed.

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It will be noted that the tax imposed is not one upon the property, real or personal, of the president, nor upon his income, but clearly a tax upon his vocation or calling. In *Railroad Co. v. Peniston*, 18 Wall. 5, the supreme court of the United States laid down the general rule that: "The exemption of agencies of the federal government from taxation by the states is dependent, not upon the nature of the agents, nor upon the mode of their constitution, nor upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does, in truth, deprive them of power to serve the government as they are intended to serve it, or hinder the efficient exercise of their power. A tax upon their property, merely, having no such necessary effect, and leaving them free to discharge the duties they have undertaken to perform, may be rightfully laid by the states; a tax upon their operations, being a direct obstruction to the exercise of federal powers, may not be." The agency there in question was a railroad company chartered by act of congress, and it was held that the property owned by it was subject to taxation, but that no tax could lawfully be imposed upon the franchises or rights of the company to exist and perform the functions for which it was brought into being. Page 37. In *Allen v. Carter*, 119 Pa. St. 192, 13 Atl. 70, it appears that a statute of Pennsylvania provided, "It shall be a misdemeanor for the cashier of any bank of this commonwealth to engage in any other profession, occupation or calling." In construing this statute, the court held it was not intended to apply to national banks, for the reason that, "the power of congress to create a complete system for the government of national banks being conceded, a disqualification may not be imposed upon an officer of such institution by an act of the state legislature, where none has been imposed by the act of congress." In the opinion, MR. JUSTICE PAXSON calls attention to the fact that, if a state be at liberty to impose one qualification upon officers of national banks, it may likewise impose others, until

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the business be most seriously embarrassed or rendered entirely impracticable. Certainly, the efficiency of such institutions might be impaired by such a state law. This, as we have seen, cannot be done. Our conclusion, therefore, is that the act of the general assembly which imposes a tax on the presidents of each of the banks of the state is inoperative when sought to be applied to the presidents of national banks doing business in this state, because the ultimate effect of the imposition of such a tax tends to impair the efficiency of such national banks of which they are presidents to discharge the duties imposed upon them by the laws of the United States. Judgment affirmed. All the justices concurring.

NOTE.

Taxation of National Banks.—That a state has no power to tax a national bank, or its property, or the means of performing its functions, so as to impair or destroy its usefulness as an agency of the general government, see *McCullough v. Maryland*, 4 Wheat. 316; *Osborn v. U. S. Bank*, 9 Wheat. 738; *Dobbins v. Commissioners of Erie Co.*, 16 Pet. 435.

But legislation which does not impair the usefulness or capability of instrumentalities of the general government is not within the rule of prohibition. *National Bank v. Commonwealth*, 9 Wall. 353; *Thompson v. Pacific R. R.*, 9 Wall. 579.

PEOPLE *ex rel.* HEERMANCE *et al.* TAX COM'RS

v.

DEDERICK, CITY ASSESSOR.

(*Court of Appeals of New York, March 14, 1899.*)

Savings Banks—Deposits—Exemption from Taxations—Construction of Statute.*—Under the statute exempting “the deposits in any bank for savings which are due depositors” from taxation, the exemption applies to depositors as well as to the bank.

APPEAL from supreme court, appellate division, Third department.

*See notes at end of case.

People *ex rel. v.* Dederick, City Assessor

Application for *mandamus* by the people, on relation of Martin Heermance and others, constituting the state board of tax commissioners, against Addison E. Dederick, as assessor of the city of Kingston. From an order of the appellate division affirming an order denying the writ (54 N. Y. Supp. 519), petitioners appeal. *Affirmed.*

J. Newton Fiero, for appellants.

Geo. W. Wickersham, for respondent.

GRAY, J. This case presents the converse of the proposition which we had before us in the Newburgh Sav. Bank Case, 157 N. Y. 51, 51 N. E. 412, where it was sought by the assessor of the city of Newburgh to assess the savings bank as to its surplus funds. Here the endeavor is, on the part of the taxing authorities, to assess the depositors in the savings banks of the city of Kingston for the amount of their deposits. In the former case referred to we held that there could be no assessment under the statute, and in the course of the opinion it was pointed out that the provisions of the banking law made it clear that every interest in the funds held by a savings bank is vested in the depositors; that the bank acquires no interest therein, and is deemed to hold what property it has for the benefit of depositors only. The language of the exemption clause in question (Laws 1896, c. 908, § 4, subd. 14) is to be taken as referring to the property itself which the bank is holding and managing. It is "the depositors in any bank for savings which are due depositors" which the law exempts from taxation, and it is quite immaterial whether we say that the property so exempted consists in the indebtedness of the bank to its depositors, or that it is the fund itself which is withdrawn from the operation of the tax law. Clearly, the corporation is not subject to assessment, either upon the principle that it has no property in its deposits, or because, under the provisions of the tax law, any assessment as to its personal property would be offset by the authorized deduction of its liabilities,

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which, as we saw in the Newburgh Sav. Bank Case, covered everything which it held. Therefore it would seem logically to follow that the statutory exemption applies, and was intended to apply, to depositors in savings banks, and to relieve them from assessment for taxation as to their deposits. The discussion in the Newburgh Sav. Bank Case and the opinion in the appellate division below render it unnecessary, in my judgment, to discuss this question further. The order should be affirmed, without costs. All concur, except PARKER, C. J., and HAIGHT, J., who take no part. Order affirmed.

NOTES.

Savings Banks—Deposits—Double Taxation.—When the money is deposited the legal title held by the trustee, and the equitable title held by the depositor, are no more than they were before when he held them both undivided. The title to the money is divided, not multiplied, by depositing it in a savings bank. *Robinson v. Dover*, 59 N. H. 521. Nor does such division of title subject the property to double taxation. *Berry v. Windham*, 59 N. H. 288, 47 Am. Rep. 202. And where deposits are taxed to the bank, the assessment of a tax upon depositors is double taxation and unconstitutional. *People v. Badlam* 57 Cal. 594, 602; *Nashua Sav. Bank v. Nashua*, 46 N. H. 389.

Same—Same—Exemptions—Federal Statute.—The provision of U. S. Rev. St., § 3408, that savings banks "shall be exempt from tax on so much of their deposits as they have invested in securities of the United States, and on all deposits not exceeding \$2,000 made in the name of any one person," exempts from tax all deposits to the extent to which they are invested in United States securities, and also to the extent of \$2,000. *German Sav. Bank v. Archbold*, 104 U. S. 708, reversing 15 Blatchf. C. Ct. 398.

CITY AND COUNTY OF SAN FRANCISCO

vs.

CROCKER-WOOLWORTH NAT. BANK OF SAN FRANCISCO.

(Circuit Court, N. D. California Feb. 25, 1899.)

National Banks—Personal Property—State Taxation.—The personal property of national banks cannot be directly assessed to them by the state for purposes of taxation.

City, etc., of San Francisco *v.* Crocker-Woolworth Nat. Bank

DEMURRER to complaint. *Sustained.*

Alfred Fuhrman, for plaintiff.

Lloyd & Wood, for defendant.

DE HAVEN, District Judge. The defendant is a national banking association, organized and existing under and by virtue of the laws of the United States, and having its principal place of business at the city and county of San Francisco, state of California. The action is brought to recover the sum of \$7,754.64 and interest thereon, alleged to be due from the defendant for state, city, and county taxes on personal property, consisting of fixtures and money belonging to and assessed to it under the laws of the state for the purposes of taxation for the year 1896. The defendant has demurred to the complaint, and the single question arising thereon is whether personal property belonging to a national bank is subject to taxation by the state.

Congress, in the exercise of its undoubted power, has, in section 5219, Rev. St. U. S., declared what property of national banks may be thus taxed. It is therein provided that real property of national banks shall be subject to state, county, and municipal taxes, "to the same extent, according to its value, as other real property is taxed," and that the shares in any such association shall be assessed as other personal property, to the owner or holder of such shares. The effect of this statute is to exempt personal property belonging to national banks from direct assessment and taxation by the state; that is, the personal property of such banks cannot be directly assessed to them by the state for purposes of taxation. That this is so is so well settled as not to require discussion at this time. *Rosenblatt v. Johnston*, 104 U. S. 462; *People v. Weaver*, 100 U. S. 539—543; *Covington City Nat. Bank v. City of Covington*, 21 Fed. 484; *People v. National Bank of D. O. Mills & Co.* (Sup. Ct. Cal., Dec. 19, 1898) 55 Pac. 685. The demurrer will be sustained, and judgment thereupon entered in favor of the defendant, the defendant to recover costs.

Stapylton v. Thaggard, Tax Collector

STAPYLTON

v.

THAGGARD, TAX COLLECTOR.

(*Circuit Court of Appeals, Fifth Circuit, Dec. 20, 1898.*)

National Banks—State Taxation.—A state cannot tax a bank chartered by congress, except as to real property.

Same—Same—Shareholders.—An assessment upon all the personal property of a national bank, against the bank itself, is not an assessment upon the shares of the bank, and against the shareholders.

Same—Requiring Banks to Pay Tax Against Shareholders—Insolvency.*—Where a bank is insolvent and has passed into the hands of a receiver, a tax assessed against the shares of the bank cannot be collected from the receiver, or from assets in his hands.

APPEAL by complainants from the Circuit Court of the United States for the Southern District of Florida. *Reversed.*

The appellant (complainant in the court below) filed his bill against E. P. Thaggard, tax collector for Marion county, Fla., and therein alleged: That the Merchants' National Bank of Ocala became insolvent, and complainant was appointed receiver thereof, and entered upon the discharge of his duties. That on January 1, 1896, one Joseph C. Matthews, as tax assessor in and for Marion county, Fla., made an assessment on said Merchants' National Bank of Ocala in the words and figures as follows:

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“(Valuable or other personal property, except animals. This includes the value of all household and kitchen furniture, books, watches, silverware, moneys in possession or at interest, or capital invested in trade, including notes and accounts, \$50,000.00.)

The aggregate value of personal property thus obtained by adding column 10 and 11.....	\$50,000 00
Total amount of state taxes, $3\frac{3}{4}$ mills, $27\frac{1}{2}$ cents on \$100.00	187 50
Total amount of county taxes, 12 mills, or \$1.25 on \$100.00	625 00”

*See note at end of case.

Stapylton v. Thaggard, Tax Collector

—That the assessment book containing the said assessment was turned over to the tax collector of Marion county to collect the same, and that E. P. Thaggard is the collector now in possession of said book, and makes claim from complainant for the said sums so assessed, to wit, \$187.50 and \$625. That said tax collector will levy upon and sell the personal property of said bank, being assets, in the hands of complainant, to realize said sums as taxes. That said assessment is illegal, and should not be collected from complainant; that any collection of said taxes out of the personal property of said bank should be restrained and declared illegal and void. That a levy and sale of personal property in the hands of complainant under said assessment will work a hardship upon the trusts in complainant's hands, and cause irreparable damage to creditors of the bank. The bill prays that the assessment be declared illegal and void, and defendant be enjoined from collecting the same, and for general relief. Two demurrers are filed to the bill on the grounds of: (1) Want of equity. (2) It does not appear that complainant is entitled to the relief prayed. (3) That it appears from allegations of the bill that the assessment for taxes was lawfully made, and constituted a lien upon the property assessed prior to the failure of the bank. (4) That it does not appear from the allegations of the bill whether the assessment made for the year 1896 was based upon a return made by the bank as said bank was required to make under the law. The court sustained the demurrers and dismissed the bill on the ground that it appeared "that the assessment of taxes was properly made, and the amount constitutes a legal and valid lien upon the assets of the bank, which should be paid by the receiver." Complainant appealed, and filed the following specification of error: (1) The court erred in rendering its final decree in this cause, wherein it sustained the demurrer and dismissed the bill of complaint. (2) That the court erred in holding the said Merchants' National

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Bank of Ocala liable for the tax assessed against it, as set up in the said bill of complaint.

F. P. Fleming and *F. P. Fleming, Jr.*, for appellant.

R. A. Burford, for appellee.

Before PARDEE and McCORMICK, Circuit Judges, and PARLANGE, District Judge.

PARDEE, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

The assessment complained of is, *eo nomine*, upon the bank assets and capital. It is well settled that a state cannot tax a bank chartered by congress, except as to real property. *McCulloch v. Maryland*, 4 Wheat. 316; *Osborn v. Bank*, 9 Wheat. 738; *Weston v. City Council of Charleston*, 2 Pet. 449. Section 5210, 5219, Rev. St. U. S., are as follows:

“Section 5210. The president and cashier of every national banking association shall cause to be kept at all times a full and correct list of the names and residences of all the shareholders in the association, and the number of shares held by each, in the office where its business is transacted. Such list shall be subject to the inspection of all the shareholders and creditors of the association, and the officers authorized to assess taxes under state authority, during business hours of each day in which business may be legally transacted. A copy of such list, on the first Monday of July of each year, verified by the oath of such president or cashier, shall be transmitted to the comptroller of the currency.”

“Sec. 5219. Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the state within which the association is located; but the legislature of each state may determine and direct the manner and place of taxing all the shares

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of national banking associations located within the state, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state, and that the shares of any national banking association owned by non-residents of any state shall be taxed in the city or town where the bank is located, and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either state, county, or municipal taxes, to the same extent, according to its value, as other real property is taxed."

The law of Florida provides as to the assessment of shares of a national bank as follows:

"All shares of the banking associations organized within the state, pursuant to the provisions of the acts of congress to procure a national currency, secured by a pledge of United States stocks, and to provide for the circulation and redemption thereof, held by any person or body corporate, shall be included in the valuation of the personal property of such person or body corporate, in the assessment of taxes in the town or city where such banking association is located and not elsewhere, whether the holder resides there or not; but not at a greater rate than is assessed on other moneyed capital in the hands of individuals; and for the purpose of securing the collection of taxes assessed upon said shares, each banking association shall pay the same as the agent of each of its share-holders and the said association may retain so much of any dividend belonging to any share-holder as shall be necessary to pay any taxes levied upon its shares." Sess. Laws Fla. 1895, p. 5, § 8.

Under these provisions it is difficult to construe the assessment complained of in this case as one upon the shares of the bank, and against the shareholders. Miller v. Bank, 46 Ohio St. 424, 21 N. E. 860; Bank v. Fisher, 45 Kan. 726, 26 Pac. 482; National Bank v. Mayor, etc., of Mobile, 62 Ala. 284; and Sumter Co. v. National Bank,

Same—Same—
Shareholders.

Note

Id. 464. If, however; this difficulty could be obviated, and the assessment complained of taken and held to be one against the shareholders of the bank, the case made by the bill, showing the insolvency of the bank and the appointment of a receiver, is one which releases the receiver and any assets in his hands from liability to pay the tax. See *Rosenblatt v. Johnston*, 104 U. S. 462. As we construe the cases, from *First Nat. Bank v. Com.*, 9 Wall. 353, to *First Nat. Bank v. Chehalis Co.*, 166 U. S. 440, 17 Sup. Ct. 629, the bank is made to pay the taxes assessed by the state against its shareholders, when the state statutes lay such duty upon the bank, upon the theory that the shares are valuable, and that the bank has assets in its hands belonging to the shareholders from which it can recoup. Where a bank is insolvent, and has passed into the hands of a receiver, the shares are generally worse than worthless;

Name—Requiring
Banks to Pay Tax
against Sharehold-
ers—Insolvency.

and the receiver has no assets belonging to the shareholders which can be applied to the payment of taxes assessed on shares. In such case, we are of opinion that the tax assessed against the shares of the bank cannot be collected from the receiver, or from assets in his hands. The case of *City of Boston v. Beal*, 51 Fed. 306, is directly in point; the Massachusetts statute being substantially the same as the statute of Florida, in providing that the shares of stock shall be assessed to the owner, and the tax paid by the bank. The decree of the circuit court sustaining the demurrers and dismissing the complainant's bill is reversed, and the cause is remanded, with instructions to overrule the demurrer, and thereafter proceed in accordance with the views expressed in this opinion, and as equity may require.

NOTE.

Tax on Shares—Liability of Receiver of Insolvent Corporation.—A tax on the shares of stock of a corporation cannot be enforced against the corporation's assets after it becomes insolvent, nor against a receiver's assets. *Lionberger v. Rowse*, 43 Mo. 67; *Relfe v. Columbia L. Ins. Co.*, 11 Mo. App. 374, *Cooley on Taxation*, p. 433.

First Nat. Bank of Wellington v. Chapman, Treasurer

FIRST NAT. BANK OF WELLINGTON, OHIO

v.

CHAPMAN, TREASURER OF LORAIN COUNTY, OHIO.

(*Supreme Court of the United States, February 27, 1899.*)

State Taxation of National Banks—"Moneyed Capital"—Discrimination.—The term "moneyed capital," as used in section 5219 of the Revised Statutes of the United States, does not include capital which does not come in competition with the business of national banks, and exemptions from taxation, however large, such as deposits in savings banks or of moneys belonging to charitable institutions, which are exempted for reasons of public policy, and not as an unfriendly discrimination as against investments in national bank shares, cannot be regarded as forbidden by the federal statute.

Same—Discrimination.—Under the Ohio system of taxation there is not an unfavorable discrimination against national bank shareholders, and in favor of unincorporated banks or bankers, in assessing the value of capital employed in business, as in both cases all the debts of the business itself are deducted from the capital employed before reaching the sum which is assessed for taxation, and in neither case can the debts of the individual, simply as an individual, be deducted from the value of the capital assessed for taxation.

Case at Bar.—The record did not show that there was any unfavorable discrimination against the shareholders of national banks in the taxation of their shares, and in favor of other moneyed capital in the hands of individuals under the Ohio system of taxation, and the fact of such discrimination does not appear from the taxation laws of the state.

ERROR by plaintiff to the Supreme Court of the state of Ohio.

This action was brought to restrain the collection of taxes, through or by means of the bank, by the defendant in error, levied under a statute of Ohio, upon certain individual shareholders in the bank, on the ground, as alleged, that the assessment upon such specified shareholders were illegal, as having been made without regard to the debts of such individual owners, contrary to the case of other moneyed capital in the hands of individual citizens whose

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debts were permitted to be deducted from the value of such capital before the assessment of taxes thereon.

The petition contained allegations intended to show a case for the interposition of a court of equity, and a tender was therein made of the amount of the taxes which the plaintiff admitted to be due on such shares after deducting the debts.

The answer, while not taking any objection that a case for equitable relief by injunction was not made, provided the contention of the petition as to the assessments being illegal was well founded, claimed, substantially, that, by the laws of the United States and of Ohio, the assessments were legal, and the petition should therefore be dismissed. Upon trial in the court of common pleas of Lorain county, the court found the following facts :

“First. Plaintiff is a national banking association, incorporated under and by virtue of an act of congress, entitled ‘An act to provide for the national currency, secured by a pledge of the United States bonds, and to provide for the circulation and redemption thereof,’ approved June 3, 1864, and the amendments thereof, and is established and doing business in the village of Wellington, county of Lorain, and state of Ohio.

“Second. The defendant is the duly elected and qualified treasurer of the county of Lorain and state of Ohio.

“Third. The plaintiff has a capital stock of \$100,000 divided into 1,000 shares, of \$100 each, all of which are fully paid up, and certificates for the shares are outstanding and owned by a large number of persons.

“Fourth. That in accordance with section 2765 of the Revised Statutes of Ohio, then and now in force, the cashier of plaintiff duly reported in duplicate, to the auditor of said county, the resources and liabilities of said banking association, at the close of business on the Wednesday next preceding the second Monday of May, 1893, together with a full statement of the names and residences of the shareholders therein, with the number of shares held by each, and the par value thereof,

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as required by said section ; that included in said return so made by said cashier was the real estate owned by the plaintiff, valued at \$3,420, separately assessed and charged on the tax duplicate of said county ; that thereupon said auditor proceeded, as required by section 2766 of the Revised Statutes of Ohio, to fix the total value of said shares according to their true value in money, and fixed the same at \$74,710, exclusive of the assessed value of plaintiff's real estate, and made out and transmitted to the annual board of equalization of incorporated banks a copy of the report so made by said cashier, together with the valuation of such shares as was fixed by said auditor; that said state board of equalization, acting under section 2808 and 2809 of the Revised Statutes of Ohio, did examine the return aforesaid, made by said cashier to said county auditor, and the value of such shares as fixed by said county auditor, and did equalize said shares to their true value in money, and fixed the valuation thereof at \$74,710, exclusive of the assessed value of plaintiff's real estate; and the auditor of said state did certify said valuation to the auditor of said county of Lorain, which said auditor of said county did enter upon the tax duplicate of said county for the year 1893.

"Fifth. That the following named stockholders of said bank were on the said day next preceding the second Monday of April, 1893, the owners of the number of shares of stock of said bank set opposite their respective names, to wit :

S. S. Warner.....	150 shares.
R. A. Horr.....	10 shares.
W. Cushion, Jr.....	50 shares.
C. W. Horr.....	120 shares.
O. P. Chapman.....	10 shares.
E. F. Webster.....	10 shares.
W. R. Wean.....	20 shares.
S. K. Laundon.....	120 shares.

"That said shares were valued by said state board of equalization for the year 1893 at \$36,607.90, and certified by said board to the auditor of Lorain county

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as the taxable value of the same; that the rate of taxation for all tax assessed and collected for the year 1893 within said county and village was \$0.0255 on a dollar's valuation, and amounted on said value of said shares to \$933.50.

"Sixth. That on said day next preceding said second Monday of April, 1893, and at the time the cashier of said banking association made return to the auditor of said county of the names and residences of the shareholders of said association, with the numbers and par value of the shares of capital stock of said banking association for the year 1893, to wit, between the first and second Mondays of May of said year, each of said above-named shareholders was indebted and owing to others of legal *bona fide* debts a sum in excess of the credits, from which, under the laws of Ohio, he was entitled to deduct said debts to an amount equal to the value of said shares; that proof of said indebtedness was duly made to said auditor by the shareholders aforesaid, at the time that the valuation of said shares of stock was so fixed by him; and that said auditor refused to allow the deduction of any indebtedness of said shareholders from the value of said shares, as so fixed by said board of equalization; and the auditor of said county carried upon the duplicate delivered to the treasurer, the entire valuation of said shares so made without allowing any deductions therefrom, by reason of any *bona fide* indebtedness of said shareholders to others, from the valuation so fixed by said board of equalization.

"Seventh. That the plaintiff tendered to said treasurer of Lorain county, on the 28th day of December, 1893, and offered to pay to said treasurer, the sum of \$485.80, if he would receive the same in full for the tax assessed upon the valuation of the shares of stock owned by the shareholders named in the petition for the entire year of 1893, and said treasurer refused to accept the same, and said treasurer intends, if not enjoined by this court, to use all lawful means for the collection of said tax so assessed upon the valuation of said shares of stock."

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The court also found, as a conclusion of law from the above facts, that the injunction should be denied, and the petition dismissed. The plaintiff appealed to the circuit court of Lorain county, where, after argument, the judgment for defendant was reversed, and judgment ordered for plaintiff enjoining the collection of the tax. The defendant, the treasurer of Lorain county, brought the case to the supreme court of the state, where, after hearing, the court reversed the circuit court, and affirmed the judgment of the common pleas dismissing the petition. *Chapman v. Bank*, 56 Ohio St. 310, 47 N. E. 54.

The state law on the subject of taxation, so far as it may be claimed to in any way affect the question, is contained in the various sections of the Revised Statutes of Ohio which are set out in the margin.¹

W. W. Boynton, for plaintiff in error.

F. S. Monnett and *S. W. Bennett*, for defendant in error.

MR. JUSTICE PECKHAM, after stating the facts, delivered the opinion of the court.

Complaint is made in behalf of the shareholders of the national bank in question that they are, by means of

¹ Section 2730 gives definitions of the terms used in the article relating to taxation. This section is not set out in so many words, but, as therein used, the following terms are thus defined:

(a) "Real property" and "lands" mean, not only land itself, but everything connected therewith in the way of buildings, structures, and improvements, and all rights and privileges appertaining thereto.

(b) "Investment in bonds" includes moneys in bonds or certificates of indebtedness of whatever kind, issued by incorporated or unincorporated companies, towns, cities, villages, townships, counties, states, or other incorporations, or by the United States.

(c) "Investment in stocks" includes all moneys invested in the capital stock of any association, corporation, joint-stock company, or other company, where the capital or stock is divided into shares, transferable by each owner without the consent of the other shareholders, for the taxation of which no special provision is made by law.

(d) "Personal property" includes (1) every tangible thing the subject of ownership, whether animate or inanimate, other than money, and not forming part or any parcel of real property; (2) the capital stock, undivided profits, and all other means not form-

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the system of taxation adopted and enforced in the state of Ohio, subjected to taxation at a greater rate than is imposed upon other moneyed capital in the hands of individual citizens, contrary to section 5219 of the Revised Statutes of the United States.

The complaint is founded upon the allegation that the owners of what is termed "credits" in the law of Ohio (Rev. St. § 2730) are permitted to deduct certain kinds of their debts from the total amount of their credits, and such owners are assessed upon the balance only, while no such right is given to owners of shares in national banks. The claim is that shares in national banks should be treated the same as credits, and their owners permitted to deduct their debts from the valuation. The owners of property other than credits are not permitted to deduct their debts from the valuation of that property.

It is also claimed that there is an unfavorable discrimination against the national bank shareholder, and in favor of an unincorporated bank or banker.

At the outset it is plain that the system of taxation

ing part of the capital stock of a company, whether incorporated or unincorporated, and all interest in such stock, profits, or means, including shares in a vessel, as therein stated; (3) money loaned on pledge or mortgage of real estate, although a deed may have been given, provided the parties consider it as security merely.

(e) The term "moneys" includes surplus or undivided profits held by societies for savings or banks having no capital stock, gold and silver coin, bank notes of solvent banks in actual possession, and every deposit which the person owning, holding in trust, or having the beneficial interest therein, is entitled to withdraw in money on demand.

(f) The term "credits" means the excess of the sum of all legal claims and demands, whether for money or other valuable thing, or for labor or service due or to become due to the person liable to pay the tax thereon, including deposits in banks, or with persons in or out of the state, other than such as are held to be money as defined in this section, when added together (estimating every such claim or demand at its true value in money), over and above the sum of legal *bona fide* debts owing by such person; but, in making up the sum of such debts owing, no obligation can be taken into account (1) to any mutual insurance company; (2) for any unpaid subscription to the capital stock of any joint-stock company; (3) for any subscription for any religious, scientific, or charitable purpose; (4) for any indebtedness acknowledged; unless founded upon some consideration actually received and believed at the time of making the acknowl-

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adopted in Ohio was not intended to be unfriendly to, or to discriminate against, the owners of shares in national banks; for, as observed by the state supreme court, that system was adopted long prior to the passage of the law by congress providing for the incorporation of national banks. Under this system, the owner of shares in national banks is taxed precisely like the owner of shares in incorporated state banks. Rev. St. Ohio § 2762.

The main purpose of congress in fixing limits to state taxation on investments in national banks was to render it impossible for the state, in levying such a tax, to create and fix an unequal and unfriendly competition by favoring institutions or individuals carrying on a similar business and operations and investments of a like character. The language of the act of congress is to be read in the light of this policy. "Moneyed capital," does not mean all capital the value of which is measured in terms of money, neither does it necessarily include all forms of investments in which

edgment to be a full consideration therefor; (5) for any acknowledgment made for the purpose of diminishing the amount of credits to be listed for taxation; (6) for any greater amount or portion of any liability as surety than the person required to make the statement of such credits believes that such surety is, in equity, bound to pay, etc.

Other sections read as follows :

"Sec. 2736. Each person required to list property shall, annually, upon receiving a blank for that purpose from the assessor, or within five days thereafter, make out and deliver to the assessor a statement, verified by his oath, as required by law, of all the personal property, moneys, credits, investments in bonds, stocks, joint stock companies, annuities or otherwise, in his possession, or under his control, on the day preceding the second Monday of April of that year, which he is required by law to list for taxation, either as owner or holder thereof, or as parent, husband, guardian, trustee, executor, administrator, receiver, accounting officer, partner, agent, factor or otherwise ; and also of all moneys, credits, investments in bonds, stocks, joint-stock companies or otherwise, held on said day by another, residing in or out of this state, for and belonging to the person so listing, or any one residing in this state, for whom he is required by law to list, and not listed by such holder thereof, for taxation in this state.

"Sec. 2737. Such statement shall truly and distinctly set forth, first, the number of horses, and the value thereof ; second, the number of neat cattle, and the value thereof ; third, the number of mules and asses, and the value thereof ; fourth, the number of sheep, and

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the interest of the owner is expressed in money. Shares of stock in railroad companies, mining companies, manufacturing companies, and other corporations are represented by certificates showing that the owner is entitled to an interest expressed in money value in the entire capital and property of the corporation; but the property of the corporation which constitutes this invested capital may consist mainly of real and personal property, which, in the hands of individuals, none would think of calling moneyed capital, and its business may not consist in any kind of dealing in money or commercial representatives of money. This statement is taken from *Mercantile Bank v. City of New York*, 121 U. S. 138, 155, 7 Sup. Ct. 826. That case has been cited with approval many times, especially in *Bank v. Ayers*, 160 U. S. 660, 16 Sup. Ct. 412, and in *First Nat. Bank of Aberdeen v. Chehalis Co.*, 166 U. S. 440, 17 Sup. Ct. 629.

The result seems to be that the term "moneyed capital," as used in the federal statute, does not in-

the value thereof; fifth, the number of hogs, and the value thereof; sixth, the number of pleasure carriages (of whatever kind,) and the value thereof; seventh, the total value of all articles of personal property, not included in the preceding or succeeding classes; eighth, the number of watches, and the value thereof; ninth, the number of piano fortes and organs, and the value thereof; tenth, the average value of the goods and merchandise which such person is required to list as a merchant; eleventh, the value of the property which such person is required to list as a banker, broker, or stock jobber; twelfth, the average value of the materials and manufactured articles which such person is required to list as a manufacturer; thirteenth, moneys on hand or on deposit subject to order; fourteenth, the amount of credits as hereinbefore defined; fifteenth, the amount of all moneys invested in bonds, stocks, joint stock companies, annuities or otherwise; sixteenth, the monthly average amount or value, for the time he held or controlled the same, within the preceding year of all moneys, credits or other effects, within that time invested in or converted into bonds or other securities of the United States or of this state, not taxed, to the extent he may hold or control such bonds or securities on said day preceding the second Monday of April; and any indebtedness created in the purchase of such bonds or securities shall not be deducted from the credits under the fourteenth item of this section; but the person making such statements may exhibit to the assessor the property covered by the first nine items of this section, and allow the assessor to affix the value thereof, and in such case the oath of the person making the statement shall be in

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clude capital which does not come into competition with the business of national banks, and that exemptions from taxation, however large, such as deposits in savings banks or of moneys belonging to charitable institutions, which are exempted for reasons of public policy, and not as an unfriendly discrimination as against investments in national bank shares, cannot be regarded as forbidden by the federal statute.

State Taxation of
National Banks—
"Moneyed Capital"
—Discrimination.

The case last cited contains a full and careful reference to most of the prior cases decided in this court upon the subject, and gives the meaning (as above stated) of the term "moneyed capital," when used in the federal statute.

With no purpose to discriminate against the holders of shares in national banks, and with the taxation of the shareholders in the two classes of banks, state and national, precisely the same, the question is whether this system of taxation in Ohio, in its practical operation, does materially discriminate against the national bank shareholder in the assessment upon his bank shares.

that regard only that he has fully exhibited the property covered by said nine items."

"Sec. 2746. Personal property of every description, moneys, and credits, investments in bonds, stocks, joint stock companies or otherwise, shall be listed in the name of the person who was the owner thereof on the day preceding the second Monday of April, in each year; but no person shall be required to list for taxation any share or shares of the capital stock of any company, the capital stock of which is taxed in the name of such company."

"Unincorporated Banks and Bankers.

"Sec. 2758. Every company, association or person, not incorporated under any law of this state or of the United States, for banking purposes, who shall keep an office or other place of business, and engage in the business of lending money, receiving money on deposit, buying and selling bullion, bills of exchange, notes, bonds, stocks or other evidence of indebtedness, with a view to profit, shall be deemed a bank, banker or bankers, within the meaning of this chapter.

"Sec. 2759. All unincorporated banks and bankers shall annually, between the first and second Mondays of May, make out and return to the auditor of the proper county, under oath of the owner or principal officer or manager thereof, a statement setting forth:

"First. The average amount of notes and bills receivable, discounted or purchased in the course of business, by such unincorporated

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Under the Ohio law, the shares in national and also in state banks are what is termed "stocks" or "investments in stocks," and are not credits from which debts can be deducted. As between the holders of shares in incorporated state banks and national banks, on the one hand, and unincorporated banks or bankers, on the other, we find no evidence of discrimination in favor of unincorporated state banks or bankers. In regard to this latter class, there is no "capital stock," so called; and section 2759 of the Revised Statutes therefore makes provision, in order to determine the amount to be assessed for taxation, for deducting the debts existing in the business itself from the amount of moneyed capital belonging to the bank or banker, and employed in the business, and the remainder is entered on the tax book in the name of the bank or banker, and taxes assessed thereon. This does not give the unincorporated bank or banker the right to deduct his general debts disconnected from the business of banking, and not incurred therein, from the remainder above mentioned. It cannot be doubted

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rated bank, banker or bankers, and considered good and collectible.

"Second. The average amount of accounts receivable.

"Third. The average amount of cash and cash items in possession or in transit.

"Fourth. The average amount of all kinds of stocks, bonds, including United States government bonds or evidences of indebtedness, held as an investment or in any way representing assets.

"Fifth. The amount of real estate at its assessed value.

"Sixth. The average amount of all deposits.

"Seventh. The average amount of accounts payable, exclusive of current deposit accounts.

"Eighth. The average amount of United States government and other securities that are exempt from taxation.

"Ninth. The true value in money of all furniture and other property not otherwise herein enumerated. From the aggregate sum of the first five items above enumerated the said auditor shall deduct the aggregate sum of the fifth, sixth, seventh and such portions of the eighth items as are by law exempt from taxation, and the remainder thus obtained, added to the amount of item nine, shall be entered on the duplicate of the county in the name of such bank, banker or bankers, and taxes thereon shall be assessed and paid the same as provided for other personal property assessed and taxed in the same city, ward or township.

"Sec. 2759a. The said bank, banker or bankers shall, at the same time, make statement under oath of the amount of capital paid in or

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that, under this section, those debts which are disconnected from the banking business cannot be deducted from the aggregate amount of the capital employed therein. The debts that are incurred in the actual conduct of the business are deducted so that the real value of the capital that is employed may be determined, and the taxes assessed thereon.

This system is, as nearly as may be, equivalent in its results to that employed in the case of incorporated state banks and of national banks. Under the sections of the Revised Statutes which relate to the taxation of these latter classes of banks (section 2762, *et seq.*), the shares are to be listed by the auditor at their true value in money, which necessarily demands the deduction of the debts of the bank, because the true value of the shares in money is necessarily reduced by an amount corresponding to the amount of such debts. In order to arrive at their true value in money, the bank returns to the auditor the amount of its liabilities as well as its resources. Thus, in both incorporated and unincorporated banks the same thing is desired, and the same result of assessing the value of the capital employed in the business, after the deduction of the debts incurred in its conduct, is arrived at in each case as nearly as is possible, considering the difference in manner in which the moneyed capital is represented in unincorporated banks as compared with incorporated banks, which have a capital stock divided into shares. That math-

employed in such banking business, together with the number of shares or proportional interest each shareholder or partner has in such association or partnership."

"Incorporated Banks.

"Sec. 2762. All the shares of the stockholders in any incorporated bank or banking association, located in this state, whether now or hereafter incorporated or organized under the laws of this state or of the United States, shall be listed at their true value in money, and taxed in the city, ward or village where such bank is located, and not elsewhere.

"Sec. 2763. The real estate of any such bank or banking association shall be taxed in the place where the same may be located, the same as the real estate of individuals."

"Sec. 2765. The cashier of each incorporated bank shall make out

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emational equality is not arrived at in the process is immaterial. It cannot be reached in any system of taxation, and it is useless and idle to attempt it. Equality, so far as the different facts will permit, and as near as they will permit, is all that can be aimed at or reached. That measure of equality, we think, is reached under this system. So far as this point is concerned, it is entirely plain there is no discrimination between unincorporated banks and bankers, on the one hand, and holders of shares in national banks, on the other.

If the value of national bank shares is increased by reason of the franchises of the bank itself, as claimed by the plaintiff in error, while no such added value obtains in the case of unincorporated banks, there is no discrimination against bank shareholders on that account. This is simply a case where added elements of value exist in the national bank shares which are absent in the case of unincorporated banks ; but in both cases all the debts of the business itself are deducted from the capital employed before reaching the sum which is assessed for taxation, and in neither case can the debts of the individual, simply as an individual, be deducted from the value of the capital assessed for taxation.

The court below did not hold, as erroneously suggested by counsel for plaintiff in error that, as the state and national banks were placed on an exact equality regarding taxation, therefore there was no discrimina-

and return to the auditor of the county in which it is located, between the first and the second Monday of May, annually, a report in duplicate, under oath, exhibiting, in detail, and under appropriate heads, the resources and liabilities of such bank, at the close of business on the Wednesday next preceding said second Monday, together with a full statement of the names and residences of the stockholders therein, with the number of shares held by each, and the par value of each share.

"Sec. 2766. Upon receiving such report the county auditor shall fix the total value of the shares of such banks according to their true value in money, and deduct from the aggregate sum so found the value of the real estate included in the statement of resources as the same stands on the duplicate, and thereupon he shall make out and transmit to the annual state board of equalization for incorporated banks a copy of the report so made by the cashier, together with the valuation of such shares as so fixed by the auditor."

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tion made against national banks, and in favor of other moneyed capital in the hands of individual citizens. The state court said upon this subject that, if the state and national banks were treated equally, the latter were not assessed at a greater rate than the former; that national bank shareholders were not, in such event, illegally assessed, unless there was a clear discrimination in favor of moneyed capital other than that employed in either state or national banks. This statement, we think, is plainly correct.

The question recognized by the state court, therefore, remains, whether there is any such discrimination.

The chief ground for maintaining that there is exists in the fact that the owner of what is termed "credits" in the statute is permitted to deduct certain classes of debts from the sum of those credits, upon the remainder of which taxes are to be assessed, while the national bank shareholder is not permitted to deduct his debts from the value of his shares upon which he is assessed for taxation.

It is claimed, in substance, that all credits are moneyed capital, and that they are large enough in amount, when compared with the moneyed capital invested in national banks, to become an illegal discrimination against the holders of such shares.

There is no finding of the trial court upon the subject of the total amount of credits in the state. Reference was made on the argument to the report of the auditor of the state for 1893, from which it is said to appear that the total credits, after deducting the debts allowed, were \$106,000,000 or \$111,000,000, the amounts differing to that extent as presented by the counsel for the different parties. The case does not show that the trial court received the report in evidence, and nothing in any finding has reference in any way to that report. We do not think it is a document of which we can take judicial notice, or that we could refer to any statement or alleged fact contained therein, unless such fact were embraced in the finding of facts

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of the trial court, upon which we must decide this case.

However, if we were to look at this report, we should then see that the total credits do not show what portion of those credits consists of moneyed capital in the hands of individuals, which in fact enters into competition for business with national banks. It is only that kind of moneyed capital which this court, in its decisions above cited, holds is moneyed capital, within the meaning of the act of congress.

Indeed, there is no evidence as to what the total moneyed capital in the hands of individual citizens, and included in the term "credits," amounts to, even under the widest definition of that term.

In looking at the statutory definition of the term "credits," we find that so far from its including all legal claims and demands of every conceivable kind, except investments in bonds of the classes described in section 2730, and investments in stocks, it does not include any claim or demand for deposits which the person owning, holding in trust, or having the beneficial interest therein is entitled to withdraw in money on demand, nor the surplus or undivided profits held by societies for savings or banks having no capital stock, nor bank notes of solvent banks in actual possession; and, from the credits as defined, their owner cannot deduct certain kinds of indebtedness therein mentioned. It cannot be contended that all credits, as defined in the statute, are moneyed capital, within the meaning of the act of congress. The term "credits" includes, among other things, as stated in the statute, "all legal claims and demands * * * for labor or service due or to become due to the person liable to pay taxes thereon." These claims are not, in any sense of the statute, moneyed capital. They include all claims for professional or clerical services, as well as for what may be termed "manual labor," and their total must amount to a large sum. What proportion that total bears to the whole sum of credits we do not know, and the record contains no means of ascertaining.

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It is impossible to tell, from anything appearing in the record, what proportion of the whole sum of credits consists of moneyed capital, within the meaning of the federal act. We know that claims for labor or services do not consist of that kind of capital. We also know that there are probably large amounts of other forms of property which might enter into the class of credits as defined in the act which would not be moneyed capital, within the meaning of the act of congress, as that meaning has been defined by this court in the cases above cited. It is thus seen that there are large and unknown amounts of what are in the act termed "credits" which are not moneyed capital, and that the total amount of credits which are moneyed capital, within the definition given by this court to that term, is also unknown. That portion of credits which is not moneyed capital, as so defined, does not enter into the question, because the comparison must be made with other moneyed capital in the hands of individual citizens. We are thus wholly prevented from ascertaining what proportion the moneyed capital of individual citizens included in the term "credits" (and from which some classes of debts can be deducted) bears to the amount invested in national bank shares. We are therefore unable to say whether there has or has not been any material discrimination such as the federal statute was enacted to prevent. We cannot see upon these facts any substantial difference between this case and those of *Bank v. Ayers*, 160 U. S. 660, 16 Sup. Ct. 412; *First Nat. Bank of Aberdeen v. Chehalis Co.*, 166 U. S. 440, 17 Sup. Ct. 629, and *National Bank of Commerce v. City of Seattle*, 166 U. S. 463, 17 Sup. Ct. 996.

As a result, we find in this record no means of ascertaining whether there is any unfavorable discrimination against the shareholders of national banks in the taxation of their shares, and in favor of other moneyed capital in the hands of individual citizens. There is nothing upon the face of these statutes which shows such discrimination, and

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therefore it would seem that the plaintiff in error has failed to make out a case for the intervention of the court.

It is stated, however, that this specific question has been otherwise decided in *Whitbeck v. Bank*, 127 U. S. 193, 8 Sup. Ct. 1121. If this were true, we should be guided by and follow that decision. Upon an examination of the case, it is seen that the court gave chief attention to the question whether an increase in the value of the shares in national banks made by the state board of equalization, from 60 per cent. of their true value in money, as fixed by the auditor of Cuyahoga county, to 65 per cent., as fixed by the board (other property being valued at only 60 per cent.), amounted to such a discrimination in the taxation of the shareholders of such banks as is forbidden by the federal statute. It was held that it did.

Coming to the question of the deduction of the *bona fide* indebtedness of shareholders, the court assumed that, under the statute of Ohio, owners of all moneyed capital other than shares in a national bank were permitted to deduct their *bona fide* indebtedness from the value of their moneyed capital, but that no provision for a similar deduction was made in regard to the owner of shares in a national bank; and it was held that the owners of such shares were entitled to a deduction of their indebtedness from the assessed value of the shares as in the case of other moneyed capital. The point to which the court chiefly directed its attention related to the question whether a timely demand had been made for such deduction of indebtedness. It was held that it was made in time, for the reason that the court below expressly found that "the laws of Ohio make no provision for the deduction of the *bona fide* indebtedness of any shareholder from the shares of his stock, and provide no means by which such deduction could be secured." As a demand at an earlier period would have been useless, the court held it unnecessary.

An examination of the statutes of Ohio in regard to taxation shows that debts can only be deducted from

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credits, and how much of credits is moneyed capital is unknown. The case is not authority adverse to the principle we now hold.

For the reasons already stated, we think the judgment in this case should be affirmed, and it is so ordered.

PEOPLE

v.

NATIONAL BANK OF D. O. MILLS & CO.

(*Supreme Court of California, Dec. 19, 1898.*)

Taxation—Validity of Assessment.—An addition to the list, though furnished by the taxpayer to the assessor without the examination authorized under section 3632 of the Political Code, does not render the assessment void, even as to the property thus added to the list.

Same—National Banks—Exemption of Personal Assets.*—National banks and their property have been withdrawn from the domain of state taxation, except so far as congress has expressly consented that they may be taxed, and, therefore, the personal assets of a national bank are exempt from state taxation.

APPEAL by plaintiff from Sacramento county superior court. *Affirmed.*

Atty. Gen. Fitzgerald, for the People.

Lloyd & Wood, for respondent.

TEMPLE, J. The action was brought to recover taxes assessed to respondent, a national banking association organized under the acts of congress. On the first Monday in March, 1895, it had real prop-
erty in Sacramento, and also personal prop-
erty, consisting of safes and fixtures, and money on hand and money on special deposit. The blank form for a statement, with demand for a list, was served on it by the assessor; and it was returned, with a description of certain real estate, and safes and fixtures, valued at \$5,000. The assessor was dissatisfied with this, and

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*See notes at end of case.

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returned it to the president of the bank, insisting that the personal assets of the bank were liable to taxation. After considerable conversation and discussion, during which the amount of the deposits as they were afterwards assessed was stated by the president and cashier, the list was changed by erasing the item as to the safes and fixtures, and in that condition was verified and returned to the assessor by the cashier. The assessor then proceeded, without issuing any subpoena to any officer or employee of the bank, or to any other person, to assess to and against the defendant the safes and fixtures, valued at \$5,000, and deposits to the amount of \$800,000. In due time the defendant tendered the amount of the tax upon the real estate, but it declines to pay the tax upon the personal property; claiming that it is exempt under the act of congress creating national banks, as an instrumentality of the federal government. All the findings, save one, were agreed upon by the parties. It is not found, and does not appear, that the assessor considered that defendant had, after demand, refused to make a statement as to its property, or that he made an entry to that effect on the assessment book, as authorized by section 3633 of the Political Code; but it does appear that the board of equalization refused to consider the objections made by the bank to the assessment on the ground that the "assessment had been arbitrarily made, and that the board of equalization had no power to review the same." It is admitted that the bank did have the property which was assessed to it, and also that, if it is not exempt from taxation, it ought to have been given in by the bank and assessed to it. The refusal of the board to consider defendant's objections has not injured it, if the assessment was proper and would have been maintained. Judgment was for the defendant, and the people appeal from the judgment, and from an order denying a new trial.

It is contended that the assessment was illegal, for two reasons:

1. After the taxpayer has returned to the assessor his

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verified list, although the assessor knows of other property belonging to the taxpayer; although, in fact, the taxpayer has had his attention called to the matter, and admits the possession and ownership of other property, as was the fact in this case, —still the assessor cannot include such property in the assessment without first issuing a subpoena and holding an examination, as he is authorized to do under section 3632 of the Political Code. The proposition is that an addition to the list furnished by the taxpayer, without the examination, renders the assessment void,—at least, as to the property thus added to the list. Unless the statute has given such effect to the list, this position cannot be maintained. The general duty of the assessor is to list all taxable property in this county or district. The law compelling the taxpayer to furnish the list is undoubtedly designed to assist the assessor in the performance of his duties. The assessment is not judicial, and must necessarily be summary. All property should be assessed, or the burden of taxation is not imposed alike upon all. The assessor must not knowingly permit any to escape. Must he, then, when he not only is fully informed as to the property, but the taxpayer admits and states to him all the facts in regard to it, but simply contends that it is by law exempt, resort to this—in that case—useless proceeding before he can lawfully assess such property? In many states the law does give the verified list some effect, but I think it has generally been held that, unless the statute provides otherwise, it does not in any way limit the powers of the assessor. Welty, Assessm. § 4; Cooley, Tax'n 357; 1 Desty, Tax'n, p. 545. In Massachusetts it is made conclusive upon the assessor, although it has been held there that the commissioners who revise and equalize may add other property. In New York the taxpayer may make an affidavit which may have the effect to reduce his assessment, and the different states, as was to have been expected, have various schemes upon the subject. In Nevada a similar

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law was construed, and it was held that the statement was merely in aid of the assessor, and had no binding effect upon him. State v. Kruttschnitt, 4 Nev. 178. See, also, Railway Co. v. Johnson, 108 Ill. 1; Felsen-thal v. Johnson, 104 Ill. 21; Morris v. Jones, 150 Ill. 542, 37 N. E. 928; Thompson v. Tinkcom, 15 Minn. 295 (Gil. 226). The last-named case is particularly interesting upon this point. The statute there considered was quite similar to ours, and it was held that the assessor was not only at liberty to add omitted property of which he had knowledge, but was bound by his oath so to do; and it was said that, when the statute "does not directly or by implication make the oath of the party conclusive, it is merely a step in the proceedings to enable the assessor to make a complete return of all the property in his district." I believe this to be a correct statement of the general current of decisions upon the subject.

The question, then, is, is there anything in our statute which will preclude the assessor from listing any property to the taxpayer, except such as he returns in his verified list, or shall admit on examination under oath after service of a subpoena upon him? The subpoena cannot be issued until after he has made his statement, and the statute does not expressly authorize the assessor to add to the list after the issuance of the subpoena, and the examination of the taxpayer under oath, even if further property should be discovered upon such examination. Under the statute, and upon the *stricti juris* theory of construction, so much insisted upon by respondent, the assessor has no more power to add to the list after the issuance of the subpoena and after the examination than he had before, and although the existence of other taxable property may have been admitted by the taxpayer. It must be observed, also, that this construction makes the taxpayer the judge of what property is exempt from taxation, *quoad* the assessor. Counsel for respondent say it must be intended that upon the discovery of other property upon such examination the assessor

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should list it. To this I agree, but I know of no reason why property so discovered should be listed, and property discovered through the unsworn admissions of the taxpayer should not be. The provision as to the examination is but an aid to the assessor to enable him to perform the duty enjoined upon him, and which, upon making his return, he is compelled to state under oath that he has done. Pol. Code, § 3652. In respect to this, reliance is placed upon *Weyse v. Crawford*, 85 Cal. 196, 24 Pac. 735, which, it is contended, holds that the assessor cannot add to a list returned by a taxpayer, unless he has been so subpoenaed and examined. I do not so understand that opinion. It holds that the assessor cannot make an assessment which shall not be revisable by the board of equalization, unless the taxpayer has refused to make out his list under oath, or has refused to comply with some other requirement of the law. Properly understood, I have no quarrel with that decision. Unless there has been some dereliction on the part of the taxpayer, unless he has failed to render the assistance to the assessor which the law requires him to render, he cannot be subjected to the penalty of a nonrevisable assessment. This, I think, is all that was decided upon this matter in *Weyse v. Crawford*. It denominates such an assessment "an arbitrary assessment." The term is not found in the statute. As used in the opinion, it evidently has reference only to an assessment which cannot be revised by the board of equalization. This is not a ruling that the assessor cannot assess property not found in the verified lists made by a property owner.

2. As a second reason for claiming that the assessment is illegal, it is contended that the personal assets of the bank are exempt from taxation by the terms of the national banking act. It is provided in section 5219 of the Revised Statutes of the United States that nothing in that act shall prevent all shares in any association from being included in the individual assessment of the owner, in assessments made for the purpose of state

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taxation, "but the legislature of each state may determine and direct the manner and place of taxing all the shares of national banking associations located within the state, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state," etc. It was also provided that shares owned by nonresidents should be taxed in the city or town where the bank is located, and not otherwise. The original act required a list of shareholders to be kept open at the bank during business hours for the inspection of state officers, and no other visitorial power was allowed. The attorney general does not deny that a national bank is a fiscal agent of the United States, created by it as a means of exercising its powers. Nor does he apparently question the power of congress to limit or deny the right of the state to tax its property; but he contends that, although the state cannot tax an agency of the United States, it may tax the property of its agents,—at least, where there is no express inhibition by congress,—and that taxation of the personal property of a bank, as other like property in the state is taxed, is not prohibited, either expressly or impliedly, by the act of congress. Upon all these questions the decisions of the supreme court of the United States are final, and accordingly counsel have most elaborately considered numerous cases decided by that tribunal. I think counsel really disagree, however, only on one point, *viz.* whether taxation of such property is prohibited by the act of congress. Appellant states his contention as follows: "An important question raised here is whether the inherent right rests in a state to tax the property of a federal corporation, unless prohibited by congress, or whether its right to tax the property of such corporation is derived from the federal government?" The respondent submits two propositions: (1) Congress has the power; and (2) has limited the power of the state to tax the property of national banks, and, of course, that it has denied to the states the right

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to tax any property of national banks, except their real estate, although permitting the taxation of the shares to the shareholders. Since, therefore, respondent bases its claim to exemption upon the proposition that congress has prohibited the tax, it is only important as a matter of argument to determine whether the state may tax such property, unless forbidden by congress, or whether it derives its power to tax from the permission given by congress. It is an important consideration in regard to this question that congress has expressly provided for the taxation of the shares of the bank to the shareholders, and has directed the mode in which this shall be done. It has been repeatedly declared by the supreme court of the United States that by this provision congress has not deprived the states of a resource from which it could properly derive a revenue. The shares of stock may be taxed, and it is hornbook law that the stock represents the value of all the assets of the bank. It has been so expressly adjudicated in this state. *People v. Badlam*, 57 Cal. 594; *Waterworks v. Schottler*, 62 Cal. 69; *City of San Francisco v. Fry*, 63 Cal. 470. It is assumed in *Van Allen v. Assessors*, 3 Wall. 573; also in *People v. Weaver*, 100 U. S. 539, where it is asserted that the limitation was intended only "to protect the bank from anything beyond their general share of the public burdens." In many other cases the proposition is taken for granted, and it is, I think, quite obvious. Under our decisions, we cannot deny that when the capital stock is assessed the assets of the corporation are subjected to the tax. In the case of national banks the value of the shares was in part made up of United States bonds, in which a portion of the capital must be invested. The bonds are not subject to state taxation, yet no deduction is required from the assessment for the investment in the bonds. So the real estate may be assessed, as well as the stock, but the value of the shares is made up in part by the real estate. The trouble is that we do not tax to the individual shareholders the stock; but, on the other hand, we

Notes

assess to the corporation all its assets, which, we have held, gives the value to the stock. Under our methods of classification, made for the purpose of equalizing the burdens of taxation, it has been held that we cannot assess the shares of stock in a national bank as other money capital is assessed. But, conceding that congress could direct the extent and mode of taxing the property of the bank, if the mode provided would, if pursued, subject the property of the bank to taxation to the same extent that other like property is taxed, the conclusion is irresistible that it was intended that the tax expressly permitted should be the only tax to which the property is to be subjected. But it seems to me that the precise question was determined in *Rosenblatt v. Johnston*, 104 U. S. 462. A state attempted to tax the personal assets of an insolvent national bank. It was quite naturally thought that it had then ceased to be a governmental instrumentality. In a short opinion by the chief justice it was held that, as the assets still belonged to the corporation, they were exempt, under section 5234 of the Revised Statutes of the United States. In *Covington City Nat. Bank v. City of Covington*, 21 Fed. 489, MR. JUSTICE MATTHEWS refers to the case. After asserting the power of congress in the premises, he says: "It has in fact withdrawn them and their property from the domain of state taxation, except so far as it has expressly consented that they may be taxed. That consent, so far as it has been given, is contained in section 5219 of the Revised Statutes. It does not permit taxation of any property belonging to the bank, except only its real estate, as clearly appears from *Rosenblatt v. Johnston*, 104 U. S. 462." General and special deposits are assessable to the depositors. *Yuba Co. v. Adams*, 7 Cal. 35. The judgment and order are affirmed.

We concur: MCFARLAND, J.; HENSHAW, J.

NOTES.

National Banks—Taxation of Personal Assets.—The National Bank Act, while authorizing the taxation of national bank shares, does not

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permit taxation of any property belonging to the bank except its real estate. *Covington City Nat. Bank v. Covington*, 21 Fed. Rep. 484.

And no revenue can be collected by a state, county, or municipality from national banks, except by assessments upon their shares and real estate. See *National Commercial Bank v. Mayor, etc., of Mobile*, 62 Ala. 284, 34 Am. Rep. 15, 2 Nat. Bank Cas. 440.

An assessment on personal property, apparently based on the capital stock, is illegal. *National State Bank v. Young*, 25 Iowa 311.

Nor can a tax on shares of national banks be authorized by a state statute where the laws of the state merely provide for the taxation of the capital stock of its own banks, and not of the shares held therein. *Hubbard v. Johnson Co.*, 23 Iowa 130. As to a new statute with valid provisions for taxing national banks, see *Morseman v. Younkin*, 27 Iowa 350, 352.

In *Texas*, under the Revised Statutes of 1879, the real estate of national banks could not be taxed. *Rosenberg v. Weekes*, 67 Tex. 578, 18 Am. & Eng. Corp. Cas. 140. In *Maryland*, a tax not only on the shares of a national bank but also on the banking house, lot and furniture is illegal. *Frederick Co. v. Farmers', etc., Nat. Bank*, 48 Md. 117-119, *et seq.*

Same—Same—Insolvents.—The personal property of an insolvent national bank, in the hands of a receiver, under the provision of National Bank act, is, however, exempt from taxation under state laws. *Rosenblatt v. Johnson*, 104 U. S. 462, 3 Nat. Bank Cas. 32. See also as to levy subsequently to insolvency of bank, *Woodward v. Ellsworth*, 4 Colo. 580, 2 Nat. Bank Cas. 216; and further as to taxation of insolvent national bank, *Jackson v. United States*, 20 Ct. of Cl. 298.

ZANG *et al.*

v.

WYANT *et al.*

(*Supreme Court of Colorado, Dec. 19, 1898.*)

Appeal—Review.—The constitutionality of a statute cannot be questioned for the first time on appeal.

Stockholders' Statutory Liability—Enforcement—Parties.*—The additional liability of stockholders imposed by the statute of Colorado, providing that the shareholders in banks, etc., shall be held individually responsible for debts, contracts and engagements of such associations, in double the amount of the par value of the stock owned by them respectively, constitutes a fund for the benefit of all the creditors, which may be pursued in equity for the common benefit, by or for all; and an assignee, whose trust relates only to

*See notes at end of case.

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the corporate assets, acquires no right to enforce such statutory obligation.

Same—Same—Right of Action.*—Where an insolvent corporation has made an assignment, its creditors are not required to wait the collection of doubtful claims before enforcing the stockholders' liability under such statute.

Same—Construction of Statute.*—Such statute renders stockholders in banking associations individually liable for the debts of the association in double the amount of the par value of the stock owned by them, notwithstanding they may have paid, or are still liable to the corporation for, their original subscription.

Same—Interest.—Under such statute, interest allowable against the bank constitutes a part of its indebtedness, for which the stockholders are made liable, if within the maximum liability as fixed by the statute.

Evidence.*—The relation of defendants, as stockholders of the bank, was sufficiently shown by entries in the "stockbook," and by the testimony of a witness to the effect that such book represented the stockholders, and was the only book kept for the purpose; that it was kept in the ordinary course of business, while he was connected with the bank; that he made some of the entries himself; and that the persons named therein took part in the meetings of stockholders during the period of time their names appeared on the book.

Evidence.†—The claims sued upon consisted of money deposited with the bank, time and demand certificates of deposit, and drafts that had been issued by the bank, and protested for non-payment; and the "daily balance book" and the "draft book," identified by a witness who had been the bank's cashier during the period in question, were admitted to prove such claims. *Held*, that the books were admissible for such purpose in an action against the stockholders, section 4817, Mills' Ann. St., enabling a party to use his own books as evidence in his own behalf, not being applicable.

Deposits—Evidence.—Pass books were issued by the bank to each of its depositors, in which the amount of their deposits were entered by the receiving teller at the time they were made. A deposit slip, showing the amount of his deposit, was made out by the depositor; and the deposit slips were preserved by the bank, and from them the entries in the balance book were made. *Held*, that the entries in pass books furnished no better evidence of the amounts deposited than the entries in the balance book.

Certificates of Deposit—Ownership.*—Certificates of deposit are negotiable; and where a recovery is sought thereon, present ownership must be proved; and they must be produced or their destruction or loss be established; and the necessity of such proof is not obviated by the introduction in evidence of a list of verified claims presented to the assignee of the bank, and allowed by the court.

On Rehearing.

Parties.—In an action to enforce the stockholders' liability under such statute, the complaint may sufficiently state a cause of action

*See notes at end of case.

†See generally 9 Am. & Eng. Enc. Law (2nd Ed.) at p. 903.

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although neither the bank nor its assignee is made a party defendant.

Same.—In such an action, the stockholders, whether sued alone, or in connection with the bank and its assignee, can interpose any defense to the claim of the creditors which the bank could in an action against it.

Evidence—Review.—Evidence offered for the first time on appeal will not be considered.

APPEAL by defendants from Arapahoe county district court. *Modified.*

This is an equitable action brought by appellees, as creditors of the North Denver Bank, in behalf of themselves and such other creditors as may join them, against appellants, as stockholders in said bank, to enforce the statutory liability, Case Stated. under the following statute: "Section 1. Shareholders in banks, savings banks, trust, deposit, and security associations, shall be held individually responsible for debts, contracts and engagements of said associations, in double the amount of the par value of the stock owned by them respectively." Sess. Laws 1885, p. 264; Mills' Ann. St. § 533. The bank was duly incorporated under the laws of the state of Colorado August 15, 1889, and did a general banking business until July 18, 1893, when it made a voluntary assignment of all its assets to one Amos H. Root, who thereupon gave bonds, and duly qualified, and was acting as such assignee at the time of the institution of this suit. The case was tried to the court, and judgment rendered against appellants for double the amount of the par value of the stock owned by each, respectively. From these judgments appellants prosecute this appeal.

Muller & Weil, Lucius Weinschenk, Bartels & Blood, S. S. Sherman, T. E. Watters, and James H. Brown, for appellants.

Philo B. Tolles and Thomas D. Cobbey, for appellees.

GODDARD, J. (after stating the facts). The specifications of error are voluminous, and, in addition to the

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questions they raise as to the admissibility and sufficiency of certain testimony, challenge the right of appellees to maintain the action, and also the construction that the court below gave to the statute under which the recovery is sought. In their printed argument, for the first time, counsel question the validity of the act itself, upon the ground that it was never constitutionally passed. Under former decisions of this court and the court of appeals, this question

Appeal—Review.

is not properly before us for consideration. *Marean v. Stanley*, 21 Colo. 43, 39 Pac. 1086; *Rice v. Carmichael*, 4 Colo. App. 84, 34 Pac. 1010.

Counsel for appellants insist that the assignee was alone entitled to maintain the action, and that the creditors themselves cannot invoke the interposition of a court of equity to enforce the liability of stockholders, under this statute. Upon whom the right to enforce the remedy devolves, and the mode of procedure that should be adopted, have been in controversy in many of the courts of last resort, and have been variously decided; some holding that the liability is primary, and enforceable in an action at law by an individual creditor against one or more of the stockholders, while in others, and by far the greater number, it is held that the fund created by the statute is in the nature of a security for the common benefit of all the creditors, and that a suit in equity affords the most effectual and convenient remedy for its enforcement; that since the fund is exclusively for the benefit of the creditors, and forms no part of the assets of the corporation, the right of action accrues to the creditors themselves, and, in the absence of a statute conferring the right, neither the assignee nor the receiver of an insolvent corporation can maintain the action. *Terry v. Little*, 101 U. S. 216; *Pollard v. Bailey*, 20 Wall. 520; *Hornor v. Henning*, 93 U. S. 228; *Farnsworth v. Wood*, 91 N. Y. 308; *Pfohl v. Simpson*, 74 N. Y. 137; *Mathez v. Neidig*, 72 N. Y. 100; *Griffith v. Mangam*, 73 N. Y. 611; *Wincock v. Turpin*, 96 Ill. 133; *Dutcher v. Bank*, 12 Blatchf. 435.

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Fed. Cas. No. 4,203; Jacobson v. Allen, 20 Blatchf. 525, 12 Fed. 454; Minneapolis Paper Co. v. Swinburne Printing Co., 66 Minn. 378, 69 N. W. 144; Umstead v. Buskirk, 17 Ohio St. 113; Wright v. McCormack, Id. 86; Crease v. Babcock, 10 Metc. (Mass.) 525; Association v. Watkins, 70 Mo. 13; Runner v. Dwiggins (Ind. Sup.) 46 N. E. 580; Cook; Stocks, & S. § 280; Thomp. Corp. § 3560; Mor. Priv. Corp. § 869. In Terry v. Little, *supra*, CHIEF JUSTICE WAITE, in discussing the procedure that should be adopted for the enforcement of a liability provided in the charter of the Merchants' Bank of South Carolina, in language substantially the same as that used in our statute, said: "Undoubtedly, the object was to furnish additional security to creditors, and to have the payments, when made, apply to the liquidation of debts. So, too, it is clear that the obligation is one that may be enforced by the creditors; but, as it is to or for all creditors, it must be enforced by or for all. The form of the action, therefore, should be one adapted to the protection of all." In Pfohl v. Simpson, *supra*, it is said: "A suit in equity, laying hold of all the stockholders in like category, and promoted for the benefit of all creditors having like interest, is peculiarly adapted to work out exactly just and equitable results. * * *

The object and effect is only to bring to one forum the determination of rights, which must, if prosecuted separately, more or less conflict to mutual harm. Before that one forum, in one suit, the respective rights and the respective liabilities can be ascertained and determined, and each get his own, and be subjected to his own, and not another's. And the equities between the respective stockholders can also be adjusted and settled." In the recent case of Runner v. Dwiggins, the question as to the right of the assignee of an insolvent corporation to maintain the action was involved; and upon the authority of a large number of the adjudged cases, and the rule as generally laid down in the text-books, his right to maintain the action was denied. JORDAN, C. J., speaking for the court, said:

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“Certainly, it cannot be asserted with any reasonable support that this peculiar liability imposed by the statutes upon those who become shareholders of a banking association organized under the existing law is in any sense an asset, right, or interest of the bank, which it, as an insolvent debtor, can, by its deed of assignment, pass to its assignee, or in any manner vest the enforcement thereof in him. In the absence of some statutory provision conferring the right, neither the corporation, nor its assignee nor receiver, can enforce such a liability as that in question.” We have carefully examined the cases cited and relied upon by counsel for appellants as sustaining their contention. It is true that these cases, while holding that the fund can be reached only by a proceeding in equity, sustain the right of the receiver to enforce the remedy. We are, however, satisfied that the foregoing cases announce the generally accepted rule, and that, both upon reason and authority, the additional liability of stockholders imposed by our statute constitutes a fund for the benefit of all the creditors, which may be pursued in equity, for their common benefit, by or for all; and an assignee, whose trust relates only to the corporate assets, acquires no right to enforce this statutory obligation.

Stockholders' Stat-
utory Liability—
Enforcement—
Parties.

The right to maintain the present action is also challenged because it is prematurely brought. It is argued that if, as we have seen, the fund provided by the statute is in the nature of an additional security for the creditors, the liability of the stockholders is secondary, and not enforceable until the assets of the corporation have been exhausted. It is undoubtedly true that this fund does not constitute the primary or regular fund for the payment of the corporate liabilities, and that the corporate funds are the primary resource to which creditors must look for the payment of their debts and the discharge of the corporate obligations. But a well-recognized exception to this rule exists when, by reason of dissolution or insolvency, an action against the corporation would be

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Right of Action.

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unavailing. 1 Cook, Stock, Stockh. & Corp. Law, § 200; Terry v. Tubman, 92 U. S. 158; Hodges v. Mining Co., 9 Or. 200. We think the facts averred in the complaint and disclosed by the evidence bring this case within this exception. It appears that the North Denver Bank on July 18, 1893, was insolvent, and made an assignment of all its assets; that the appellees filed their claims with the assignee, and the same were allowed, and there has been paid only 20 per cent. of the original amounts. No further sum having been realized during the length of time that has elapsed, it is evident that the remaining assets, if any, consist of worthless or doubtful claims. Under these circumstances, the creditors ought not to be compelled to await their collection, or delay the enforcement of the statutory liability against the stockholders; but justice requires that the stockholders themselves should be compelled to pay their claims, and look to the assignee for whatever may be realized from the remaining assets. Moses v. Bank, 1 Lea, 398; Starke v. Burke, 9 La. Ann. 341. As was said in the former case: "They [creditors] will not be required to wait the collection of doubtful claims, or claims in litigation. The stockholders must pay promptly, and take upon themselves the onus of delay and risk as to all such claims." For these reasons, we think the foregoing objections to the maintenance of this action by appellees were properly overruled.

It is further intended that the court below erred in its conclusion as to the extent of the liability imposed by the statute, and in rendering judgment against each of the stockholders in double the amount of the par value of the stock owned by them, respectively. The language of the statute is: "Shareholders in banks * * * shall be held individually responsible for debts * * * of said associations, in double the amount of the par value of the stock owned by them respectively." It is said that the true intent and meaning of this language is to make the stockholders responsible to the amount of stock subscribed, and in addition thereto a sum equal

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to its par value, or, as expressed by counsel, "He is first liable to the corporation to the full par value of his stock, and next liable to the creditors in an equal amount," and that this constitutes the double liability contemplated by the statute ; that the judgment of the court below, in effect, imposed upon them a triple liability. As supporting this view, counsel cite Beach, Priv. Corp. § 162 ; Thomp. Liab. Stockh. § 37 ; 1 Cook, Stock, Stockh. & Corp. Law, § 215 ; 2 Mor. Priv. Corp. § 881. For instance, as said by Mr. Beach, "Statutes imposing a liability 'to double the amount of stock held by them' receive the same construction as those making the shareholders liable 'to the amount of their stock.' " And like expressions are found in the other works referred to. As supporting this conclusion, they cite Perry v. Turner, 55 Mo. 418 ; Matthews v. Albert, 24 Md. 527 ; Norris v. Johnson, 34 Md. 485 ; Booth v. Campbell, 37 Md. 522 ; Schricker v. Ridings, 65 Mo. 208 ; Gay v. Keys, 30 Ill. 413. In addition to these, Mr. Beach also cites Appeal of Parrish (Pa. Sup.) 19 Atl. 569. Upon a careful examination of these cases, we are unable to find any warrant for the rule as announced. In Matthews v. Albert and in Norris v. Johnson the statute under consideration provided that the stockholders were severally and individually liable to the creditors of the company to an amount equal to the amount of the stock held by them, respectively, etc. ; and it was held that the liability to creditors was measured by the par value of the stock, without reference to the amount they may have paid on the stock. To the same effect is Gay v. Keys, *supra*. In Schricker v. Ridings the only question considered was whether a stockholder could be made liable to a creditor when the full amount of stock owned by him had been paid, under section 6, art. 8, of the constitution of Missouri, as amended in 1870, which enacted that "in no case shall any stockholder be individually liable in any amount over and above the amount of the stock owned by him or her" ; and the court held that he could not, by reason of the negative form of expression employed, but said :

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"If the amendment of 1870 had declared in express terms that every stockholder should be individually liable to the amount of the stock owned by him, it might well be argued, on the authority of the cases cited by the plaintiffs' counsel, that as they were already liable to the creditors of the corporation for the full amount of their stock, paid and unpaid, the constitution intended to provide further security for such creditors, by superadding the individual liability of stockholders in a sum equal to the amount of their respective shares of stock." We find no expression in any of these decisions that intimates that statutes imposing a liability "to double the amount of stock held" should be given the same signification and receive the same construction as those making shareholders liable "to the amount of their stock," except in *Perry v. Turner*, where the court refers to section 6, art. 8, of the constitution of Missouri of 1865, which provided that stockholders should be individually liable, over and above the stock owned by them, in a further sum at least equal in amount to such stock, as creating a double liability; while in the Appeal of *Parrish* (a case that involved the construction of a statute which, like ours, imposed a liability upon stockholders "to the extent of double the amount of their stock") the court clearly shows that this language is not to be construed to mean the same as that which limits the liability of stockholders "to an amount equal to the stock held," but that the latter phrase imposes a single, while the former imposes a double, liability. It has been almost uniformly held that when a statute fixes the liability of stockholders "in an amount equal to the stock held by them," or "to the amount of their stock," it imposes a liability to the amount of the par value of their shares, in addition to their subscription to the stock. *McDonnell v. Insurance Co.*, 85 Ala. 401, 5 South. 120; *Briggs v. Penniman*, 8 Cow. 387; *Pettibone v. McGraw*, 6 Mich. 441; *Root v. Sinnock*, 120 Ill. 350, 11 N. E. 339; *Lane's Appeal*, 105 Pa. St. 49; *Buenz v. Cook*, 15 Colo. 38, 24 Pac. 679. It therefore logically follows that where the language is, "in

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double the amount of stock held," an obligation in double the amount of such par value is imposed. Appeal of Parrish, *supra*; Terry v. Little, *supra*. In the latter case the charter under consideration provided that stockholders should be "liable and held bound * * * for any sum not exceeding twice the amount of * * * their * * * shares." After quoting this language, CHIEF JUSTICE WAITE said: "This, as we think, means that, on the failure of the bank, each stockholder shall pay such sum, not exceeding twice the amount of his shares, as shall be his just proportion of any fund that may be required to discharge the outstanding obligations." Although the double-liability clause, as found in our statute, is, and for several years has been, in force, either by virtue of constitutional, statutory, or charter provisions, in the states of Illinois, Minnesota, and Pennsylvania, we are aware of no case wherein it has been expressly passed on and construed, except in the Appeal of Parrish. There are, however, cases which reached the courts of final resort in these jurisdictions where the amount recoverable thereunder was necessarily involved; and, while the meaning of this clause was in no way raised or discussed, from an examination of the cases it will be seen that a liability in double the amount of the stock, in addition to the subscription, was enforced. McCarty v. Lavasche, 89 Ill. 270; Munger v. Jacobson, 99 Ill. 349; Harper v. Carroll (Minn.) 69 N. W. 610; Allen v. Walsh, 25 Minn. 543. As we have seen, statutes of this character are intended to furnish a fund exclusively for the benefit of creditors; and, under the rule laid down in all the cases, they are to be construed as imposing an individual liability upon stockholders, in addition to their liability to the corporation for the amount of their subscription to the stock. Accepting this as the correct rule of construction, the plain and obvious import of the language of our act is to make stockholders in banking associations individually liable for the debts of the association in double the amount of the

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of Statute.

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par value of the stock owned by them, notwithstanding they may have paid, or are still liable to the corporation for, their original subscription.

But it is said that the judgment is excessive for the further reason that appellees were allowed interest upon their claims. We do not think this claim is well founded. The stockholders are responsible for the debts, contracts, and engagements of the bank; and if, from the nature of the contract or debt, interest was allowable against the bank, it would constitute a part of its indebtedness, for which the stockholders are made liable, if within the maximum liability as fixed by the statute. *Richmond v. Irons*, 121 U. S. 27, 7 Sup. Ct. 788; *Wheeler v. Millar*, 90 N. Y. 353. Same—Interest.

It is also urged that the relation of appellants, as stockholders of the bank, was not shown by competent and sufficient evidence. Mr. Root produced and identified what was known as the "stock book" of the bank. He testified that the book represented the stockholders in the bank, and was the only one kept for that purpose. Section 508 Mills' Ann. St., provides: "It shall be the duty of the directors or trustees of every such corporation * * * to cause a book to be kept by the secretary or clerk thereof, containing the names of all persons, alphabetically arranged, who are or shall within one year have been stockholders of such corporation, and showing * * * the number of shares of stock held by them respectively, and the time when they respectively became the owners of such shares, and the time when they ceased to be such stockholders. * * * Such books shall be presumptive evidence of the facts therein stated in any suit or proceedings against such corporation, or against any one or more stockholders." Evidence. This book conforms to these requirements. The witness also testified that it was kept in the ordinary course of business, while he was connected with the bank, and that he made some of the entries himself, and that the persons named took part in the meetings

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of stockholders during the period of time their names appeared on the book. We think the book, together with this testimony, was sufficient.

A further ground urged for reversal is that the findings of the trial court are not supported by proper and competent evidence. The claims sued upon consist of money deposited with the bank, time
Evidence.

and demand certificates of deposit, and drafts that had been issued by the bank, and protested for non-payment. To prove these claims, appellees called as a witness Mr. Root, who was cashier of the bank during the time the deposits were received, and the certificates and drafts issued, and who had acted as assignee of the bank since it ceased doing business. He produced and identified what is called the "daily-balance book," which showed the accounts of depositors, and the "time-certificate register," and the "demand-certificate book," which showed what certificates of deposit had been issued by the bank, and also the "draft book," which showed the checks or drafts drawn by the bank on the bank which kept its balances in the East. Objection was made by appellants to the introduction of these books in evidence on the ground—First, that they were not properly authenticated; and, second, because they did not constitute the best evidence, and were not admissible against the defendants. We think these objections are untenable. The witness testified that he was familiar with the books of the bank; that these books were used by the bank in conducting its business; that the bank did not keep an individual ledger, and the daily-balance book was the only one that showed the state of the depositors' accounts, and the entries therein were made by the employees of the bank, under his supervision, as cashier, and that of the other officers; that the books had been in his possession since the assignment. It is insisted that this showing is not sufficient, under our statute (section 4817 Mills' Ann. St.), to render the books admissible. The object of that section is to enable a party to use his own books as evi-

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dence in his own behalf, and it is not applicable where the books are introduced to show admissions against the interest of the party making them. In order to render the books of a party admissible for the latter purpose, it is only necessary that they be shown to be his books, kept in the regular course of his business, and that entries therein were made by himself, or an agent authorized to make them. In *McHose v. Wheeler*, 45 Pa. St. 32, it was held that: "A ledger, found, after the company had failed, with other papers of the company, in the office of a director, and he had left the state, and which that director had produced in other proceedings as the ledger of the company, is sufficiently proved for admission in evidence as such; and entries therein, showing the nature and amount of the indebtedness of the company to the plaintiffs, are competent evidence, upon their part, of the fact." We think the showing was sufficient to admit the books in evidence.

But it is said that the pass books of plaintiffs were better evidence of the amounts due than this balance book, and ought to have been produced. These pass books were small books issued by the bank to each of its depositors, in which the amount of their deposits, were entered by the receiving teller at the time they were made. A deposit slip was made out by the depositor, showing the amount of his deposit, and presented with the pass book. These slips were preserved by the bank, and from them the entries in the daily-balance book were made. The entries in both therefore correspond, and those in the pass books furnish no better evidence of the amounts deposited than the entries in the balance book. Besides, this book showed what its name indicates,—the balance remaining to the credit of a depositor after the checks which were drawn against it had been deducted. Nor can we agree with counsel that this evidence was not admissible against appellants. As we have seen, entries made in the due course of business, by those authorized to make them, are admissible against the corporation itself; and since the

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corporation is a mere legal entity organized for the benefit of its stockholders, and acting in all its dealings for them, and on their account, it follows that it is equally admissible against them. As was said in *Schalucky v. Field*, 124 Ill. 617, 16 N. E. 904: "It is true that the entries in the pass book are made by an officer of the bank, and not by the stockholder. But such officer, in making the written entries, acts as the agent and representative not only of the corporate entity known as the 'bank,' but of the stockholders regarded as unincorporated partners. The written evidence of indebtedness is as binding upon the latter as upon the former."

We think, therefore, the books were properly admitted in evidence, and were competent to show the amount of the deposits for which the bank was liable, that certain certificates of deposit and drafts were issued by the bank at the time for the amounts and to the parties therein named, and that such certificates were still outstanding. But this itself is not sufficient to entitle the parties to whom these evidences of indebtedness were so issued to recover thereon in this case. The certificates of deposit are negotiable instruments, and transferable by indorsement and delivery. It was therefore incumbent upon those who sought to recover thereon to prove their present ownership, and produce them upon the trial, or show by competent testimony that they have been lost or destroyed; otherwise, a recovery might be had by the original payee, after he had transferred and parted with his title to the instrument to a *bona fide* holder, who would have a right to maintain an action thereon notwithstanding such recovery. With the exception of six of the certificates of deposit sued upon, these essential requirements were not complied with. This is admitted by counsel for appellees, but they contend that the necessity for such proof was obviated by the introduction in evidence of a list of verified claims presented to the assignee,

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and filed by him with the clerk of the district court, and the subsequent action of the court in relation thereto, from which it appears that these claims were allowed by the court, and dividends ordered paid thereon. This claim is based upon the theory that such an allowance constitutes a judgment binding upon the bank and also upon the appellants. We think this view is erroneous. Such allowance does not constitute a judgment in *personam*, even against the bank. It is at most a judgment in *rem*, fixing the status of the claimant towards the assigned property, and establishing his right to participate in the benefits of the assignment. *Eppright v. Kauffman*, 90 Mo. 25, 1 S. W. 736. We think, therefore, that the court erred in allowing a recovery upon these certificates, and upon the Chilcott draft for \$13.25, without requiring them to be produced upon the trial, or their loss or destruction shown. This necessitates a reversal of the judgment, so far as the allowance of these claims is concerned. But, since they are distinct, and can easily be separated from the other claims that were properly proved and allowed, a reversal of the entire judgment may be avoided. The judgment, therefore, as to all the appellees except those whose recoveries are predicated thereon, is affirmed; and as to them the judgment is reversed, and the cause remanded, with directions to allow them, or such of them as may elect so to do, a reasonable time in which to supply the proof that we have found to be requisite in such cases. Judgment modified.

On Rehearing.

PER CURIAM. On petition for rehearing on the part of appellants, we have been favored with elaborate and able arguments, both printed and oral, by which the main questions upon which the decision of this cause is predicated have been very fully presented and argued; but, after mature deliberation, we are satisfied that the views announced in our former opinion are correct, and fully sustained by the authorities cited. One question argued, namely, the failure of appellees to make

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the bank and assignee parties should be further noticed.

Parties. That they were not joined as plaintiffs did not render the complaint defective, in failing to state a cause of action against the stockholders, for the reason already given, that the liability of appellants as shareholders is solely for the benefit of the creditors of the bank, and for the purpose of creating a fund over which neither the bank nor its assignee has any control or authority to collect; but conceding that, for the purpose of a complete determination of all the rights involved, they should have been made parties defendant, by virtue of either section 497, Mills' Ann. St., or section 16 of the Code, the failure to do so cannot be considered here, because appellants, by answering over after demurrer on the ground of defect of parties, have waived the right to raise the question on appeal. *Car-Coupler Co. v. League*, 25 Colo.—, 54 Pac. 642. Nor does the fact that neither the bank nor assignee were

Same. made parties defendant in any manner affect the rights of the stockholders, because, whether sued alone, or in connection with the bank and its assignee, they would have the right to interpose any defense to the claim of the creditors which the bank could.

In support of their petition for rehearing, appellees have brought in, and filed with the clerk of this court, certain evidences of indebtedness of the bank which were not presented on the trial below, and with respect to which the judgment has been reversed, and ask that we now modify our former opinion by directing judgment upon these claims. We cannot consider original evidence in the case, and it is obvious, therefore, that the directions in the original opinion with reference to these matters are proper. Petitions for rehearing denied.

CAMPBELL, C. J., not participating in this or former opinion.

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Stockholder's Statutory Liability—By Whom Enforceable.—The statutes creating the liability against the stockholders were enacted for the benefit of the creditors, and it is these creditors, when the

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right of action accrues, that are authorized to maintain the action. This doctrine is affirmed and settled by many authorities. See *Runner v. Dwiggins* (Ind.), 6 Am. & Eng. Corp. Cas., N. S., 462; *Wallace v. Milligan*, 110 Ind. 498; *Ewing v. Stultz*, 9 Ind. App. 1; *Gainey v. Gilson* (Ind.), 7 Am. & Eng. Corp. Cas., N. S., 659; *Jacobson v. Allen*, 12 Fed. 454; *Wright v. McCormack*, 17 Ohio St. 86; *Umstead v. Bns-kirk*, *Id.* 113; *Association v. Watkins*, 70 Mo. 13; *In re People's Live-Stock Ins. Co.*, 56 Minn. 180; *Pfohl v. Simpson*, 74 N. Y. 137; *Farnsworth v. Wood*, 91 N. Y. 308; *Wincock v. Turpin*, 96 Ill. 135; *Dutcher v. Bank*, 12 Blatchf. 435, Fed. Cas. No. 4,203; *Lane v. Morris*, 8 Ga. 468; *Elliott R. R.* §§ 185-187; *Mor. Priv. Corp.* § 869; *Thomp. Corp.* § 3560; *Taylor, Priv. Corp.* § 721; *Cook, Stock & S.* § 216; *Paper Co. v. Swinburne* (Minn.) 69 N. W. 144.

JUDGE THOMPSON, in his Commentaries on Corporations, in the section cited, says: "It may be stated as a general rule that statutes making stockholders individually liable to creditors, independently of what they owe the corporation on account of their stock, create a right following directly from the stockholders to creditors. The sums thus secured to creditors form no part of the assets of the company, but are a supplemental or superadded security for the benefit of creditors. An attempted assignment of this security is therefore inoperative. No action to enforce such liability can be brought by a receiver or assignee of the corporation; such an action must be brought by one or more of the creditors." In *Cook on Stock & Stockholders*, in the section to which we have referred, the author says: "The statutory liability of a stockholder is created exclusively for the benefit of the corporation creditors. It is not numbered among the assets of the corporation, and the corporation has no interest in it. It cannot be enforced by assessment upon the shareholders. Nor can the corporation, on insolvency assign it to a trustee for the benefit of corporate creditors." In the case of *Jacobson v. Allen*, *supra*, it is said: "The receiver of an insolvent corporation takes his title through the corporation. He cannot, through his appointment, acquire that which the corporation never had. He represents the creditors of the corporation in the administration of his trust, but his trust relates only to the corporate assets. As trustee for creditors, he represents them in following the assets of the corporation, and can assert their rights in cases where the corporation could not have been heard. He is not a trustee for creditors in relation to assets which belong to them individually or as a body. * * * Neither a receiver, an assignee in bankruptcy, nor an assignee under a voluntary general assignment for the benefit of creditors, each of whom represents creditors as well as the insolvent, acquires any right to enforce a collateral obligation given to a creditor or to a body of creditors by a third person for the payment of the debts of the insolvent."

Same—Enforcement—Necessity of Judgment.—The rule that a creditor must have obtained a judgment against the corporation with a return of *nulla bona* before proceeding to enforce the stockholder's statutory liability does not generally hold good as to a bankrupt, dissolved or extinct corporation. *Chamberlin v. Bromberg*, 83 Ala. 576; *McDonnell v. Alabama Gold L. Ins. Co.*, 85 Ala. 401; *Paine v. Stewart*, 33 Conn. 516; *Gibbs v. Davis*, 27 Fla. 531; *Kimbrow v. Bank of Fulton*, 49 Ga. 419; *Patterson v. Lynde*, 112 Ill. 196, 10 Am. & Eng. Corp. Cas. 195; *First Nat. Bank v. Greene*, 64

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Iowa 445; *Stark v. Burke*, 9 La. Ann. 341; *Knight v. Frost*, 14 Mo. App. 231; *Dryden v. Kellogg*, 2 Mo. App. 87; *State Sav. Assoc. v. Kellogg*, 52 Mo. 583; *Remington v. Samana Bay Co.*, 140 Mass. 494, 12 Am. & Eng. Corp. Cas. 97; *Chamberlain v. Huguenot Mfg. Co.*, 118 Mass. 532; *Shellington v. Howland*, 53 N. Y. 371; *Ansonia Brass, etc., Co. v. New Lamp Chimney Co.*, 53 N. Y. 123, 13 Am. Rep. 476; *Kincaid v. Dwinelle*, 59 N. Y. 548; *Walton v. Coe*, 110 N. Y. 109; *Hardman v. Sage*, 124 N. Y. 25, 36 Am. & Eng. Corp. Cas. 145; *Camden v. Doremus*, 3 How. Pr. (N. Y.) 515; *Lovett v. Cornwall*, 6 Wend. (N. Y.) 369; *People v. Bartlett*, 3 Hill (N. Y.) 570; *Loomis v. Tiff*, 16 Barb. (N. Y.) 541; *Walser v. Seligman*, 21 Blatchf. (U. S.) 130; *Hollingshead v. Woodward*, 35 Hun (N. Y.) 410; *Penniman v. Briggs*, 1 Hopk. (N. Y.) 300; *Slee v. Bloom*, 19 Johns. (N. Y.) 456, 10 Am. Dec. 273; *Bank of Poughkeepsie v. Ibbotson*, 24 Wend. (N. Y.) 479; *Richards v. Beach*, 5 N. Y. Supp. 574; *Young v. Brice*, 18 N. Y. St. Rep. 945; *Hodges v. Silver Hill Min. Co.*, 9 Oregon 200; *Morgan v. Lewis*, 46 Ohio St. 1; *Barrick v. Gifford*, 47 Ohio St. 180, 21 Am. St. Rep. 798; *Bronson v. Schneider* (Ohio, 1892), 33 N. E. Rep. 233; *Moses v. Oconee Bank*, 1 Lea (Tenn.) 398; *Terry v. Tubman*, 92 U. S. 156; *Flash v. Conn*, 109 U. S. 371, 3 Am. & Eng. Corp. Cas. 28; *Reynolds v. Douglass*, 12 Pet. (U. S.) 497; *Toucey v. Bowen*, 1 Biss. (U. S.) 81; *Terry v. Anderson*, 95 U. S. 628. See also *Cuykendall v. Douglas*, 19 Hun (N. Y.) 577.

But the mere fact that corporate property is insufficient to meet liabilities will not take a case out of the rule. *Younglove v. Kelly Island Lime Co.* (Ohio, 1892), 33 N. E. Rep. 234.

Same—Double Liability—Construction of Statutes.—In *Root v. Sinnock*, 120 Ill. 350, 19 Am. & Eng. Corp. Cas. 317, 60 Am. Rep. 559, the bank's charter contained this proviso: "Provided also that the stockholders in this corporation shall be individually liable to the amount of their stock for all debts of the corporation, and such liability shall continue for three months after the transfer of any stock on the books of the corporation." It was held that the stockholders were each individually liable to pay to the creditors of the bank, not merely the balance unpaid upon subscriptions for stock, but to the extent of the nominal or face value of the stock held by them for debts of the bank. And SCHOLFIELD, J., for the court, observed: "The contention of appellant is, that the liability imposed by the seventh section of the charter of the Union Bank of Quincy, upon the stockholders, is simply to pay creditors of the bank the balance unpaid upon subscriptions for stock. The language of the seventh section, affecting this question, is: 'Provided also that the stockholders of this corporation shall be individually liable to the amount of their stock, for all debts of the corporation; and such liability shall continue for three months after the transfer of any stock on the books of the corporation.' The plain and obvious meaning of this language is, to our minds, the stockholders are liable to creditors for their debts, to an extent measured by the amount of their stock. Omitting the clause expressing the extent of liability, we have this: 'The stockholders of this corporation shall be individually liable for all debts of the corporation.' If this were all, their liability would be unlimited—they would be absolutely liable for all debts of the corporation. The intention, however, is to limit that liability; but to what extent? The answer is: 'To the amount of their stock'—not to the amounts unpaid on their stock. The

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language makes the liability because of the fact of being stockholders, and not because of the fact of being debtors of the corporation. If the liability intended was simply to pay the creditor the amount due the corporation, what would have been more natural and easy than to have used just that language?" Under a statute making stockholders liable for debts existing against the corporation at the time of the dissolution "to the extent of their respective shares of stock," their liability extends not merely to the loss of the amount of the stock, but to a further sum equal to such amount, if necessary to pay the debts. *Briggs v. Penniman*, 8 Cow. (N. Y.) 387, 18 Am. Dec. 454. See also *McDonnell v. Alabama Gold L. Ins. Co.*, 85 Ala. 401; *Pettibone v. McGraw*, 6 Mich. 441; *Sacketts Harbor Bank v. Blake*, 3 Rich. Eq. (S. Car.) 225. But the contrary rule is held in *Lewis v. St. Charles County*, 13 Mo. App. 48. See also *Schricker v. Ridings*, 65 Mo. 208; *Gausen v. Buck*, 68 Mo. 545.

The provision that stockholders shall be liable "to an amount equal to their stock" is generally held to render stockholders liable for a sum equal to their full subscription after the latter has been paid. *Wheeler v. Miller*, 90 N. Y. 359; *In re Empire City Bank*, 18 N. Y. 199; *Ohio L. Ins., etc., Co. v. Merchants' Ins., etc., Co.* 11 Humph. (Tenn.) 1, 53 Am. Dec. 742; *Lewis v. St. Charles County*, 5 Mo. App. 225; *Briggs v. Penniman*, 8 Cow. (N. Y.) 387, 18 Am. Dec. 454; *Bank of Poughkeepsie v. Ibbotson*, 24 Wend. (N. Y.) 473.

The phrase "to double the amount of the stock held by them", creates a liability for twice the amount of the subscription. *Parish's Appeal* (Pa. 1890), 19 Atl. Rep. 569; *Perry v. Turner*, 55 Mo. 418; *Matthews v. Albert*, 24 Md. 527; *Norris v. Johnson*, 34 Md. 485; *Booth v. Campbell*, 37 Md. 522; *Schricker v. Ridings*, 65 Mo. 208; *Gay v. Keys*, 30 Ill. 413.

But a provision for liability "to an amount equal to the amount unpaid on the stock" imposes no obligation to pay beyond par value. *Patterson v. Lynde*, 106 U. S. 519, 10 Am. & Eng. Corp. Cas. 195; *Stephens v. Fox*, 83 N. Y. 313; *Mills v. Stewart*, 41 N. Y. 384; *Brundage v. Monumental, etc., Min. Co.*, 12 Oregon 322; *Ladd v. Cartwright*, 7 Oregon 329.

Books as Evidence of Membership.—The books of the corporation are *prima facie* evidence of its membership. *Semple v. Glenn*, 91 Ala. 245, 24 Am. St. Rep. 894; *Howard v. Glenn*, 85 Ga. 238, 21 Am. St. Rep. 156; *Coffin v. Collins*, 17 Me. 440; *Penobscot R. Co. v. Dummer*, 40 Me. 172, 63 Am. Dec. 654; *Whitman v. Grantie Church*, 24 Me. 236; *Downing v. Potts*, 23 N. J. L. 66; *In re Election of Officers*, 44 N. J. L. 529, 1 Am. & Eng. Corp. Cas. 359; *Lewis v. Glenn*, 84 Va. 947; *Vanderwerken v. Glenn*, 85 Va. 9; *In re St. Lawrence Steamboat Co.*, 44 N. J. L. 529, 1 Am. & Eng. Corp. Cas. 359; *Hamilton, etc., Plank R. Co. v. Rice*, 7 Barb. (N. Y.) 157; *Hoagland v. Bell*, 36 Barb. (N. Y.) 57; *McHose v. Wheeler*, 45 Pa. St. 32; *Bank of Commerce's Appeal*, 73 Pa. St. 59; *Glenn v. Orr*, 96 N. Car. 413; *Haynes v. Brown*, 36 N. H. 545; *Pittsburgh, etc., R. Co. v. Applegate*, 21 W. Va. 172, 16 Am. & Eng. R. Cas. 440; *Glenn v. McAllister*, 46 Fed. Rep. 883; *Glenn v. Liggett*, 47 Fed. Rep. 472; *Turnbull v. Payson*, 95 U. S. 418; *Rockville Turnpike, etc., Co. v. Van Ness*, 2 Cranch (C. C.) 449; *Stephens v. Follett*, 43 Fed. Rep. 842, 31 Am. & Eng. Corp. Cas. 466; *Taylor v. Hughes*, 2 Jones & L. (Ir. Ch.) 55.

In Rhode Island, a book purporting to be the record book of the

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company, containing entries authenticated in part by the secretary's signature and in part identified by the bookkeeper who copied them, is admissible. *Congdon v. Winsor*, 17 R. I. 236, 36 Am. & Eng. Corp. Cas. 199.

When books have been lost, a certified copy of the recorded list of stockholders is *prima facie* evidence as to the ownership of the stock. *Cleveland v. Burnham*, 64 Wis. 347, 10 Am. & Eng. Corp. Cas. 221.

Same—English Rule.—A paper containing none of the essentials required by the act of incorporation, though styled a register of shareholders, is not a sufficient evidence of membership. *Wolverhampton, etc., Co. v. Hawksford*, 7 C. B., N. S., 795, 97 E. C. L. 795. But the register may be evidence, though not authenticated. *Cornwall, etc., Min. Co. v. Bennett*, 5 H. & N. 432. And a requirement that the register be sealed within a certain time is directory merely; without such sealing a subscriber may be held liable for calls. *Wolverhampton, etc., Co. v. Hawksford*, 11 C. B., N. S., 456, 103 E. C. L. 456. Where the company is required to keep two registers which are to be *prima facie* evidence of membership, production of both is necessary, though either contains the list of members; but where the defendant is properly registered, it is no objection to the sufficiency of the evidence that other members are not. *London, etc., R. Co. v. Fairclough*, 2 M. & G. 674.

But *Hill v. Manchester, etc., Co.*, 5 B. & Ad., 866, holds that corporate minutes are not admissible on behalf of the company in a suit against it by one of its stockholders.

Same—Examples.—When the name of an individual appears on the stock book of a corporation as a stockholder, the *prima facie* presumption is that he is the owner of the stock; and in an action against him as a stockholder the burden of proving that he is not a stockholder, or of rebutting the presumption, is cast upon him. *Holland v. Duluth Iron Mining & Development Co. et al.*, 4 Am. & Eng. Corp. Cas., N. S., 381.

When a person's name appears on the books of a corporation as a stockholder, the presumption is that he is the owner of the stock, and the *onus* is on him to show that his name was not subscribed by himself nor by his authority, express or implied; and the books are admissible as evidence against him, though he denies the genuineness of his subscription by plea verified by affidavit. *Sample v. Glenn* (Ala.) 35 Am. & Eng. Corp. Cas. 618. In *Glenn v. Orr*, 96 N. Car. 413, the books were held as evidence in an action to recover an assessment of membership and the state of member's account.

The books of a corporation which, in proceedings previously instituted in a court of chancery, had been identified by the superintendent and trustee of the company, who also proved the handwriting of the various officers of the company, by whom they were written and kept, are properly admitted in evidence, in a subsequent action to enforce the liability of the stockholders, when identified by a person who was present in the chancery court when the books were produced and identified. *Vanderwerken v. Glenn*, 13 Va. L. J. 91; 6 S. E. Rep. 806, 21 Am. & Eng. Corp. Cas. 527.

Corporate Books as Evidence to Show Who Are Stockholders.—The books of a corporation furnish evidence as to what persons are entitled to the rights and privileges of stockholders, and as to whom creditors may look for payment when the corporation becomes insolvent, the creditors being presumed to have relied on the books.

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United States Wind-Engine & P. Co. *v.* Davis. (Kan.) 42 Pac. Rep. 590.

Same—Not Conclusive.—But they are not conclusive evidence of membership. *Mudgett v. Horrell*, 33 Cal. 25; *Chaffin v. Cummings*, 37 Me. 76; *Brewster's F. Ins. Co. v. Burger*, 10 Hun (N. Y.) 56; *Stephens v. Follett*, 43 Fed. Rep. 842, 31 Am. & Eng. Corp. Cas. 466; *Waterford, etc., R. Co. v. Pidcock*, 8 Exch. 279.

Under the New York statute the court is warranted in going behind the entries in the transfer book to determine membership. *Strong v. Smith*, 15 Hun (N. Y.) 222.

Same—Not Evidence.—But it is held in California that the stock book of a corporation is not admissible to prove a party a stockholder, in an action by a creditor of the company against him. *Mudgett v. Horrell*, 33 Cal. 25. And in Pennsylvania, it is said that the books of a corporation purporting to contain subscriptions to the stock of the company are not, of themselves, evidence of the existence of such subscriptions. *Philadelphia & W. C. R. Co. v. Hickman*, 28 Pa. St. 318. See also *Hill v. Manchester, etc., Co.*, 5 B. & Ad., 866 and see the principal case.

The business transactions of a corporation with its members are on the same footing as its transaction with strangers, and business entries in its books of account are not more evidence against the members than they are against strangers. *Rudd v. Robinson*, 126 N. Y. 113, 33 Am. & Eng. Corp. Cas. 301.

Certificates of Deposit.—A certificate of deposit being a negotiable instrument, the bank has a right, upon payment of the deposit, to insist that the certificate shall be produced and delivered up to it; and where payment is demanded and it appears that the certificate is in the hands of a third person claiming title to it, the bank may properly refuse payment, and this although a bond of indemnity be tendered to it. *Read v. Marine Bank*, 59 Hun (N. Y.) 578.

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v.

CITIZENS' BANK OF JENNINGS.

(*Supreme Court of Louisiana, Jan. 9, 1899.*)

Banks—Right of Stockholder to Inspect Books.*—A shareholder, or other person, with a laudable object to accomplish, or a real and actual interest upon which to predicate his request for information disclosed by the books of a bank, is given by the fundamental law the right to inspect them.

Same—Same—Agents.*—The claim that the right of inspection is strictly personal to the shareholder, and cannot be exercised by

*See notes at end of case.

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another for him, and in his stead, as an agent or executor, is without force; for, if that were true, the possession of the right would be futile in many instances.

Same—Same—By-laws.—A by-law of a corporation, which provides that no stockholder or other person shall have the right to inspect the books without special authority from the board of directors, must be subordinated to the provisions of the charter and the general and fundamental law.

On Rehearing.

Compensation of Expert.—While, in a proper case, an accountant or expert may be appointed by the court to assist a party in interest in the examination the law gives him the right to make of the books of a bank or other corporation, no part of the compensation to be paid such expert should be assessed against the defendant bank or corporation.

(Syllabus by the Court.)

APPEAL by defendant from parish of Calcasien judicial district court. *Modified.*

Cline & Cline, for appellant.

Schwing & Moore, for appellee.

WATKINS, J. The relatrix, as executrix of Dr. E. M. Burke, deceased, instituted suit in the district court, coupled with an application for a writ of *mandamus*, to compel the respondent bank to

Case Stated.

permit her to have view and to make an inspection of the books of the bank, alleging that the deceased at his death was the owner and possessor of 15 shares of the capital stock of the bank, and that the estate under her administration is still the owner thereof. She avers that under the constitution and laws of the state she has the right to inspect and examine the books of said bank for the purpose of ascertaining, among other things, the amount of capital stock subscribed, the names of the owners of stock, the amounts owned by them, respectively, the amount of stock paid up, the transfers of stock, and the dates thereof, and the amount of assets and liabilities of the bank. She further avers "that said right is valuable, and the exercise thereof necessary to enable her to ascertain the real value of said stock, what, if any, dividends are due thereon, the condition of said estate in account with said bank, the solvency or insolvency

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thereof, and the best interests of said estate in connection therewith." She alleges that due demand was made upon the legal custodian of said books and assets "for permission to make an inspection and examination," and that said demand was peremptorily refused, and that said refusal was a denial of justice, and "left her without remedy by the ordinary course of law." For answer, the respondent pleads the general issue, and then specially denies that the relatrix, "in her capacity of executrix or in any other capacity, has a right to examine or inspect the books of said bank, or that the exercise of the said pretended right is necessary to subserve the interests of the succession of the said Burke, or that he ever demanded the right to examine the books of the bank." He alleges that the relatrix personally is unfriendly to the bank, and that she does all of her own business through another bank, and persistently seeks to deter her friends from patronizing the respondent bank; that she is not a stockholder of said bank, and has no interest in the conduct or management of its business; and that, being advised of her unfriendliness, it fears and has just grounds to apprehend "the damage she might be able to do respondent's business, if permitted to examine the books of the bank, where she could learn the names of its customers, their financial standing in the community, and other business secrets, the divulgence of which would be ruinous to the business interests of the respondent." The further averment is that the relatrix "persistently follows, in her business affairs, the advice of one L. M. Valdetero, who is notoriously unfriendly to the interests of the respondent bank; and that he is plaintiff in a suit now pending before your honorable court wherein he seeks to recover \$10,000 as alleged damages against the respondent"; that "the monthly sworn statements of the affairs of respondent bank contain ample information to all those interested in said bank as to its financial condition, the value of its stock, what dividends are due thereon, and as to its solvency; that, moreover, the cashier of said bank has offered, and

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still stands ready, to furnish plaintiff a full and complete statement of the account of the succession of E. M. Burke with the said bank." Respondent further avers that under a by-law of the bank "no stockholder or any other person shall have the right to inspect the books of the bank without special authority," and that no such authority was ever applied for, or granted by the board of directors of the bank; that said by-law is in strict accord with the custom and usage among banks, and that such application is and was a condition precedent to permission being granted for an examination by other than regular officers of the bank; and that, if the relatrix did make demand upon the president or cashier of the bank for permission to make an examination of the books of the bank, they were wholly without authority to grant the request without the sanction of the board of directors being first obtained. The case was tried, and decided in favor of the relatrix, and the writ of *mandamus* was made peremptory, and from that judgment the respondent has prosecuted this appeal.

The transcript presents us with a brief statement of facts, which is herewith transcribed in part, *viz.*: "That at the time of his death E. M. Burke was a stockholder, and that the estate is still owner of fifteen shares (\$1,500.00) of stock, in the Citizens' Bank of Jennings, La. That Mrs. Burke, executrix, accompanied by L. M. Valdetero, called * * * at the bank, and asked to be allowed to inspect and examine the accounts of said E. M. Burke with said bank on the bank's books, etc. That the cashier states that she only asked to examine Dr. Burke's account, [though] all agree that he refused, and that he was and is the custodian of the books of the bank. That the evidence shows that an effort was made to see the president, but that he was absent from the parish. The evidence shows that L. M. Valdetero has a suit against the bank, and is unfriendly with the cashier, but friendly with the stockholders and officers of the bank." On this state of the pleadings and evidence, the ques-

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tion for decision is whether the relatrix is entitled to the relief she demands, and which was granted by the judge *a quo*.

The first and principal point taken by the counsel for respondent is that the relatrix is without interest as a stockholder, and for that reason without right to demand an inspection of the books of the bank; she being merely the executrix of a deceased stockholder, and without any personal right of examination. The constitution of 1879 made it the duty of all corporations organized or doing business in this state under the laws or authority thereof to have and maintain a public office for the transaction of its business, "and where shall be kept for public inspection books in which shall be recorded the amount of the capital stock subscribed," etc. Const. 1879, art. 245. In the recent decision of this court in State *ex rel.* Bourdette v. New Orleans Gaslight Co., 49 La. An. 1556, 22 South. 815, it was held that the right conferred by that article secures to stockholders of a corporation the right to inspect its books, and, if the right of inspection be unreasonably denied, *mandamus* would lie to enforce it; but the court said that "by 'public inspection' is meant, not the inspection of the idle, the impertinent, or the curious,—those without an interest to subserve, or advance, or protect. It was never contemplated that any and everybody, as the whim may seize him or them, should be permitted to walk into the office of the company or corporation, and pry into its affairs. But a shareholder or other person, with a laudable object to accomplish, or a real or actual interest upon which to predicate his request for information disclosed by the books, is given, by the fundamental law itself, the right to inspect them." (Our italics.) In our opinion, the relatrix, as the executrix of a deceased shareholder of the stock of the respondent bank, has brought herself within the scope and plain intendment of that decision, and thus disclosed an interest sufficient to justify a resort to *mandamus*. Indeed, we can perceive no reason why the

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person representing as executrix the deceased shareholder, should not have the same right of inspection *pro hac vice* as the latter had while living. That she is not personally a shareholder of the respondent bank, and perhaps a shareholder of another bank, could not be reasonably considered as excluding the right of the estate altogether; nor do we consider the particular danger pointed out in the defendant's return as likely to result from the inspection proposed as sufficient to justify a refusal of relief to the executrix altogether. Of course, proper care should be taken, in the exercise of the right of inspection accorded to her, that the interest of the bank be amply protected and safeguarded from idle curiosity or undue inquisitiveness into the private affairs, not appertaining to the legitimate objects to be attained by the inspection. Nor should the one examining into the affairs of the bank be permitted to examine into the matter of depositors' accounts, to find out who are depositors; if any one is a depositor, the amount to his credit; or anything connected with private matters of depositors.

Article 273 of the constitution of 1898 is identical with that of article 245 of 1879. In *Legendre v. Association*, 45 La. Ann. 669, 12 South. 837, a similar interpretation was placed upon the latter article as was done in the *Bourdette Case*, and in the course of our opinion, we said: "The constitutional right to inspect the books [of a corporation at a reasonable time] cannot reasonably be denied. There can be no question that the ownership of stock confers the authority to see that the property is well managed. The exercise of this authority involves primarily the right to examine the books." In *State v. Bienville Oil-Works Co.*, 28 La. Ann. 204, the particular question here presented was decided adversely to the present contention of respondent thus, *viz.*: "The objection that, if the relator has the right he claims, it is personal to himself, and cannot be exercised by another, we regard as having no force. The possession of the right in question would be futile if the possessor of it, through lack of knowl-

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edge necessary to exercise it, were debarred the right of procuring in his behalf the services of one who could exercise it." It seems quite apparent that this rule is entirely applicable to the case of an executrix, the denial of right of inspection to whom would be equivalent to an exclusion of the right of a deceased stockholder altogether.

On the second proposition which counsel for the respondent submits with regard to the sufficiency of the demand made by the relatrix to entitle her to relief by *mandamus*, we are of opinion that the answer should be an affirmative one; for it is not denied that Dr. Burke was a shareholder of the bank, and a depositor as well, and it is admitted that, notwithstanding she is executrix of his estate, her demand for an examination of the books of the bank, and particularly those containing his account, was peremptorily refused. The management of the bank seems to have conceded the refusal by the cashier an act of its own, and hence the case is differenced from the Case of Legendre, 45 La. Ann. 669, 12 South. 837. We are of opinion that the point made in the respondent's answer to the effect that a by-law of the corporation, which declares that no stockholder or other person shall have the right to inspect the books of the bank without special authority from the board of directors cannot prevail against the relatrix. This question was considered by the court in Cockburn *v.* Bank, 13 La. Ann. 289, and in the course of their opinion they said: "Defendant avers that by the charter of the Union Bank, and the laws applicable thereto, the entire management of its affairs and the control of its books and property are confided to a board of directors, who administer the same, and have the right of deciding when, by whom, and for what purpose the said books shall be inspected, except in cases specially provided by law; and that petitioner has in law no right to demand at his pleasure the inspection of the books," etc. "If the board of directors have the exclusive right alleged to exist in them, they must derive the power and prerogative from the free banking laws of the state or the

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charter. * * * Defendant has not, however, called our attention to any act of the legislature, to any part of the charter of the bank, or to any of its rules or by-laws which confer such exclusive authority upon the board of directors, and we are not aware of the grant of any such prerogative exclusively to the board of directors. A stockholder in a corporation possesses all his individual rights, except so far as he is deprived of them by *the charter or the law of the land*. As long, then, as the charter, or the rules and by-laws passed in conformity thereto, *and the law*, do not restrict his individual rights, he possesses them in full, and can demand to exercise them. It cannot be denied that it is the right of every one to see that his property is well managed, and to have access to the proper sources of knowledge in this respect." (Our italics.) Taking that opinion as our guide, it is evident that a by-law, of itself, is not sufficient to vest full power in a board of directors to decide whether a shareholder may inspect the books of a corporation or not; but, that a by-law should be thus authoritative, it must have the sanction of the charter and the general law. But, in the light afforded by the jurisprudence interpreting the fundamental law in the premises, we think both the charter and the law are subordinated thereto. Our examination of this case has brought us to the same conclusion it did the judge of the lower court. Judgment affirmed.

On Application for Rehearing.
(Feb. 20, 1899.)

BLANCHARD, J. The court *a qua* granted the plaintiff's prayer for an expert to assist her in the examination she desired to make of the books of the bank, which, under the law, she has the right to inspect. The plaintiff had asked for the appointment of a particular person, named by her, as such expert. The defendant bank, while resisting the demand for an inspection of its books as herein sought, asked that, in the event the inspection was granted, and the court thought it a proper case for the appointment of an ex-

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pert to assist plaintiff in the examination, the person named by plaintiff be not appointed, because he was inimical to the bank ; and that some other disinterested and unprejudiced person be named as such expert. The court declined to name the party suggested by plaintiff, and appointed as expert W. H. Simmons. The costs of the *mandamus* proceeding were rightly adjudged against defendant bank, but we do not think any part of the compensation which will be due the expert should have been charged against the bank. The judgment below directs that such compensation be paid jointly by plaintiff and defendant.

As this expense cannot be reckoned any ^{Compensation of Expert.} part of the costs of this litigation, and as the examination is a matter desired by plaintiff alone, and for her benefit alone, the compensation of the expert should be borne by her alone. In this respect the judgment appealed from is erroneous, and it becomes necessary to correct the same. It is therefore ordered that the former decree of this court, hereinbefore handed down, be set aside, and it is now adjudged and decreed that the judgment appealed from be so amended as to strike therefrom the award against defendant of any part of the compensation which will become due the expert appointed to assist plaintiff in her examination of the books of the bank, and it is directed that such expense be borne by plaintiff alone; and that, as thus amended, the judgment of the court *a qua* be affirmed, costs of the lower court to be taxed against defendant, those of appeal against plaintiff and appellee. Rehearing denied.

NOTES.

Right of Stockholder to Inspect Corporate Books—Common Law.—At common law stockholders have the right to examine and inspect the books and records of the corporation of which they are members, at all reasonable times, in order that they may thereby be informed of the condition of the corporation, its purpose and business. The doctrine of the law is that the books and papers of an incorporated company, although of necessity kept in the hands of some proper officer or agent, are the property of all the shareholders. *Lewis v. Brainerd*, 53 Vt. 519; *Commonwealth v. Phoenix*

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Iron Co., 105 Pa. St. 111; *Huyler v. Cragin Cattle Co.*, 40 N. J. Eq. 392, 12 Am. & Eng. Corp. Cas. 159; *Rosenfeld v. Einstein*, 46 N. J. L. 479; *People v. Throop*, 12 Wend. (N. Y.) 183; *Cockburn v. Union Bank*, 13 La. Ann. 289; *Field on Corporation*, § 118; *Angell & Ames on Corporation*, § 681; *Cook on Stock and Stockholders*, § 311.

Same—Statutes.—And this common law right is confirmed by statute in most of the states of this country and in England. And it has been held that the common law right of inspection remains, although a special statutory right is also given. *People v. Lake Shore & M. S. R. Co.*, 11 Hun (N. Y.), 1. A state statute giving a stockholder right to inspect the books of a corporation, applies to national banks located within the state. *Winter v. Baldwin*, 89 Ala. 583, 31 Am. & Eng. Corp. Cas. 406. And sections 5240 and 5241, Rev. St. U. S., providing for national bank examiners and the exemption of these corporations from all visitorial powers other than those authorized by congress or vested in courts of justice, does not affect this statutory right of the stockholder. *Winter v. Baldwin*, 89 Ala. 583, 31 Am. & Eng. Corp. Cas. 406.

Same—Qualifications of Rule.—The stockholders, directors, or incorporators of a corporation or banking company may, at proper times, and for special and proper purposes, inspect and copy the books of the corporation or company. *Rex v. Merchant Tailors' Co.*, 2 B. & Ad. 115, 22 E. C. L. 40; *In re Burton and Saddlers' Co.*, 31 L. J. Q. B. 62; *Rex v. Babb*, 3 T. R. 579; *Williams v. Prince of Wales Ins. Co.*, 23 Beav. 338; *Hatch v. City Bank*, 1 Rob. (La.) 470; *Brouwer v. Cotheal*, 10 Barb. (N. Y.) 216, 5 N. Y. 562; *People v. Mott*, 1 How. Pr. (N. Y.) 247; *People v. Cornell*, 47 Barb. (N. Y.) 329, 35 How. Pr. (N. Y.) 31; *Central Nat. Bank v. White*, 37 N. Y. Sup. Ct. 297, 70 N. Y. 220; *Ferry v. Williams*, 41 N. J. L. 332; *Foster v. White*, 86 Ala. 467; *Huyler v. Cragin Cattle Co.*, 40 N. J. Eq. 392, 42 N. J. Eq. 139; *Phoenix Iron Co. v. Com.*, 113 Pa. St. 513.

Same—By Agents.—And such inspection may be made through an expert or other agent. *Williams v. Prince of Wales Ins. Co.* 23 Beav. 338; *Bonnardet v. Taylor*, 1 J. & H. 386; *Draper v. Manchester, etc., R. Co.*, 7 Jur. N. S. (pt. 1) 86; *Hide v. Holmes*, 2 Moll. 372; *Blair v. Massey*, L. R., 5 Ir. Eq. 623; *In re Joint Stock Discount Co.*, 36 L. J. Eq. 150; *Atty. Gen. v. Whitwood*, 40 L. J. Ch. 592; *Lindsay v. Gladstone*, L. R., 9 Eq. 132; *State v. Bienville Oil Works Co.*, 28 La. Ann. 304; *Foster v. White*, 86 Ala. 467; *Ballin v. Ferst*, 55 Ga. 546; But see *Bartley v. Bartley*, 1 Drew. 233; *Summerville v. Pritchard*, 17 Beav. 9; *Draper v. Manchester R. Co.*, 3 DeG. F. & J. 23; *In re West Devon, etc., Mine*, 27 Ch. D. 106; *Bank of Utica v. Hilliard*, 6 Cow. (N. Y.) 62.

Same—Mandamus.—The right of the shareholder to inspect the books of the company is one which he can enforce by *mandamus* in the discretion of the court. *Cockburn v. Union Bank*, 13 La. Ann. 289; *American R. Frog. Co. v. Haven*, 101 Miss. 398, 3 Am. Rep. 377; *St. Luke's Church v. Slack*, 61 Mass. (1 Cush.) 226; *State v. Goll*, 31 N. J. L. (2 Vr.) 285; *In re Sage v. Lake Shore & M. S. R. Co.*, 70 N. Y. 220; *People v. Pacific Mail Steamship Co.*, 50 Barb. (N. Y.) 280; *People v. Mott*, 1 How. (N. Y.) Pr. 247; *People v. Lake Shore & M. S. R. Co.*, 11 Hun (N. Y.), 1; *People v. Throop*, 12 Wend. (N. Y.) 183; *In re Sage v. Lake Shore & M. S. R. Co.*, 70 N. Y. 220.

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MIDLAND NAT. BANK OF KANSAS CITY

v.

BRIGHTWELL.

(*Supreme Court of Missouri, Feb. 21, 1899.*)

Collections—Insolvency—Trust Funds—Priority.*—The plaintiff bank sent items to another bank for collection, and they were collected by the latter bank by charging the accounts of certain of its depositors, with their consent, and crediting plaintiff therewith, at a time when the collecting bank had no funds on hand, except a small amount, not a dollar of which had been received from the depositors owing the collections. Plaintiff had not received payment for any portion of such collection items when the collecting bank became insolvent and assigned. *Held*, that plaintiff was not entitled to a preference over general creditors on account of such collections, it not appearing that the assets in the hands of the assignee had been augmented thereby.

APPEAL by defendant from Saline county circuit court. *Reversed.*

This cause was heard and decided by the circuit court of Saline county, on the following agreed statement of facts: "State of Missouri, County of Saline—ss.: In the Saline County Circuit Court. Midland National Bank *v.* R. T. Brightwell, Assignee Slater Savings Bank. It is hereby stipulated and agreed by and between the parties hereto that the facts in this case are as follows, and that this agreed statement may be read as evidence in this case: It is admitted that from and after the 12th day of December, 1894, and for some time prior thereto, the Midland National Bank was, and is now, a banking corporation, duly organized under the laws of the United States with reference to national banks, and doing a general banking business at Kansas City, Missouri; that on December 12, 1894, the Midland National Bank sent collection items to the Slater Savings Bank of Slater, Missouri.

*See note at end of case.

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with instructions to remit in Kansas City exchange. These items aggregated \$6,726.44, a large part of which consisted of drafts drawn on the Citizens' Stock Bank of Slater, Mo. All of these items were collected by the Slater Savings Bank, either by charging the accounts of depositors against whom the drafts were drawn after being authorized to do so by such depositors, and crediting the account of Midland National Bank, or by a clearing of the day's business with the Citizens' Stock Bank. In settlement of the balance for the day against it, the Citizens' Stock Bank gave the Slater Savings Bank its draft on St. Louis for \$4,134.31. Slater Savings Bank indorsed this draft, and forwarded it, together with its own draft, on St. Louis, for \$2,650, to the Midland National Bank, on account of the collection items above mentioned. Neither of these drafts was paid, and both the Slater Savings Bank and Citizens' Stock Bank of Slater failed December 17, 1894, and their assets are in the hands of their respective assignees. The Midland National Bank has not received payment for any portion of the collection items above mentioned represented by these drafts for \$4,134.31 and \$2,650. At the time of the failure of the bank, the assignee found in the vault the sum of \$449 in cash. And it is also admitted that said draft of \$2,650 was forwarded to plaintiff on December 14, 1894, and was duly presented for payment on December 17, 1894, when payment was refused, and said draft was protested for nonpayment; and also that the said defendant, as assignee, had in his hands at the date of the trial sufficient assets to pay the draft of \$2,650 and interest thereon in full." No other evidence was offered at the trial. Thereupon the defendant prayed the court to declare the law to be "that, under the agreed statement of facts herein, plaintiff is not entitled to charge the above check of \$2,650 as a trust fund against the Slater Savings Bank, and that the plaintiff is not entitled to a preference in its favor over the general creditors of the Slater Savings Bank, but that the said sum of \$2,650 may be allowed as a

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general claim against the assets of said bank in the hands of the defendant, as assignee thereof,"—which declaration of law the court refused to give, and defendant duly excepted to said refusal. The circuit court then rendered a decree that the said sum of \$2,650 collected by the Slater Savings Bank was received as a trust fund, and was held as such when said bank failed, and that the assignee held it in the same way; and the court further found there were sufficient assets in the hands of the assignee to satisfy said claim, and directed it paid, with interest. From this decree the assignee appeals to this court.

Leslie Orcar, A. F. Rector, and Robt. M. Reynolds,
for appellant.

Lathrop, Morrow, Fox & Moore, for respondent.

GANTT, P. J. (after stating the facts). The question involved in this appeal upon the agreed statement of facts is whether the Midland National Bank is a preferred creditor, or a mere general creditor of the Slater Savings Bank. Certain principles must be considered as settled: When a note or draft is sent by one individual or bank to another bank for collection, and to remit the proceeds to the sender, the relation of principal and agent is created, and not that of creditor and debtor. The receiving bank's duty as a collecting agent is to present the note or draft for payment, and, unless a special authority is otherwise shown, to receive in payment nothing but money, or that which by common consent is considered and treated as money. *Levi v. Bank*, 5 Dill. 104, Fed. Cas. No. 8,289; 2 Morse, Banks, § 567; *Libby v. Hopkins*, 104 U. S. 307; *People v. City Bank*, 96 N. Y. 32. Having received the note or draft for collection, it does not owe the amount thereof to the sender until collected; and, though it may credit in its books therefor, such a credit may be treated as provisional if the paper is afterwards dishonored, and it may cancel the credit. *Armstrong v. Bank (Ky.)* 14 S. W. 411. Equally plain is the law that an assignee for benefit of creditors takes

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no higher or better right to the assigned assets than his assignor possessed ; and, if the assignor stands in a fiduciary relation to the assets, that relation is cast upon the assignee. It is, moreover, undeniable that equity will follow a fund through any number of transmutations, and preserve it for the owner so long as it can be identified ; and this court has extended this doctrine, and held that when a trustee or bailee wrongfully mixed trust money with his own, so that it cannot be distinguished as to what portion is trust money, and what part private funds, equity will follow the money by taking out of the estate of the trustee or bailee, or his insolvent estate, the amount due this *cestui que trust*. *Harrison v. Smith*, 83 Mo. 210. And in *Stoller v. Coates*, 88 Mo. 514, it was held that, the general assets of an insolvent bank having been enlarged and increased by the unlawful conversion of a trust fund, the bailor or *cestui que trust* was entitled *pro tanto* to have the amount of the converted fund declared and enforced as a preferred demand against the assigned estate. In going to this length, unquestionably this court took a position in advance of the English chancery and most of the states of this Union, but with the soundness of this position we are entirely satisfied. The creditors of an insolvent person or corporation are entitled to subject his estate to their demands ; but justice and equity give them no right to appropriate the estate of another which he holds in trust.

With these acknowledged principles as our guide, the question recurs whether, upon the agreed facts of this case, the plaintiff bank has established its claim to a preference. If it can be said that its collection items augmented the assets of the Slater Bank, it would seem that there is no escape from the conclusion that it constituted a trust fund. The contention of the plaintiff is predicated upon this one statement : "It appears that all the items sent for collection on December 12, 1894, were collected by the Slater Savings Bank, partly by charging the accounts of depos-

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itors after being authorized to do so by such depositors, and crediting the Midland National Bank therewith. By thus decreasing the liability of the Slater Bank to such depositors, the assets of the bank were thereby augmented and increased to the extent of such collection items, which items so collected amounted to much more than \$2,650,"—whereas the assignee insists that this charging the account of one depositor, and crediting another, is a mere matter of bookkeeping; that not one dollar of money was actually collected by the Slater Bank to swell its assets; that, by the process resorted to, it merely attempted to transfer its indebtedness from certain of its depositors to the Midland Bank, and then gave its own exchange, knowing that it had no money to its credit in St. Louis with which it could be honored. The agreed facts fail to show that the Slater Bank had any funds on hand at the time it made this exchange on its books, with which it could have met the checks of the depositors on whom the collections were sent, except \$449. In other words, if the Slater Bank had received these collections on parties who were not its depositors, it is clear it would not have owed the amount thereof to the Midland Bank until they were collected; and even had it, in anticipation of such collection, credited the Midland Bank with the sum thereof, no principle of law or equity would have precluded it from canceling such credit because in fact it had not received the money. In this case it did not receive any money, and there was no augmentation of its assets, and the agreed statement shows no funds on hand at the time of the book entries, except \$449, not a dollar of which is shown to have been received from the depositors owing the several collections. When this court has spoken of assets being increased by the reception of a trust fund heretofore, it clearly meant actual assets, not the mere juggling of accounts, whereby debts due depositors were transferred to become a debt due a correspondent who sent collections. We are not disposed to hold that the mere canceling of a liability to one debtor, and the

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transferring it to another on the same books, is an actual increase of assets. For these transfers to have such an effect, there must have been funds in the bank upon which such transfers could have operated. The transfer of a mere naked liability to one creditor to another on the bank books added not a dollar to the Slater Bank's assets. When the transaction was finished, it was a debtor in the same amount, but to a different person, in a different capacity, and had not received an additional dollar whereby the dividends of the other creditors would be enlarged.

Upon the argument, we were inclined to the view that plaintiff had probably shown itself entitled to a preference, but upon more mature consideration we see no reason why plaintiff should be preferred to other creditors of this bank. The doctrine invoked rests upon the fact that the trust fund has gone to swell the assets of the insolvent bank, while in this case no inference can be drawn that the assets in the hands of the receiver were the product of the collections sent by plaintiff, but the contrary plainly appears. The bank was hopelessly insolvent, and received not a dollar of new assets. Justice and equity will only be conserved in this case by distributing the assets *pari passu*, and by denying plaintiff the preference it seeks. The judgment of the circuit court is reversed.

SHERWOOD and BURGESS, JJ., concur.

NOTE.

Insolvency—Right of Cestui Que Trust to Priority of Payment out of Assets.—In *McLeod v. Evans*, 66 Wis. 401. 57 Am. Rep. 287, the plaintiff had left with his banker, H., for collection, a draft upon a New York bank. H. sent the draft to a Chicago bank and received credit for the amount, and afterward made drafts upon such bank, which were cashed. Before payment to the plaintiff, H. made an assignment for the benefit of his creditors. At that time, nothing was due him from the Chicago bank. It was held that the proceeds of the draft were a trust fund in the hands of H., and that, as against other creditors, the plaintiff might enforce full payment from the assets in the hands of the assignee, although the trust fund could not be traced to any specific property.

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But in *In re Calvin v. Gleason*, 105 N. Y. 256, it was held that a trust creditor is not entitled to preference over general creditors of an insolvent, merely on the ground of the nature of the claim; and that to authorize such a preference, some specific, recognized equity founded on some agreement or relation of the debt to the assigned property, must be shown, which entitles the claim, according to equitable principles, to preferential payment. And this doctrine is supported by the following cases: *Atkinson v. Rochester Printing Co.*, 114 N. Y. 168; *Holmes v. Gilman*, 138 N. Y. 369; *Lathrop v. Bampton*, 31 Cal. 17, 89 Am. Dec. 141; *Price v. Ralston*, 2 Dall. (U. S.) 60; *School Trustees v. Kirwin*, 25 Ill. 63; *Union Nat. Bank v. Goetz*, 138 Ill. 127; *Weatherell v. O'Brien*, 140 Ill. 145, 33 Am. St. Rep. 221; *Goodell v. Buck*, 67 Me. 514; *Portland, etc., Steamboat Co. v. Locke*, 73 Me. 370; *Mutual Accident Assoc. v. Jacobs*, 141 Ill. 261, 33 Am. St. Rep. 302; *Mills v. Post*, 7 Mo. App. 519; *Duguid v. Edwards*, 32 How. Pr. (N. Y. Supreme Ct.) 254. *Thompson's Appeal*, 22 Pa. St. 16; *Illinois Trust, etc., Bank v. First Nat. Bank*, 15 Fed. Rep. 858; *Illinois Trust, etc., Bank v. Smith*, 21 Blatchf. (U. S.) 275; *Philadelphia Nat. Bank v. Dowd*, 38 Fed. Rep. 172; *Ætna Powder Co. v. Hildebrand*, *Indiana Super. Ct.*, decided April 17th, 1894.

BEARD

v.

INDEPENDENT DIST. OF PELLA CITY.

(*Circuit Court of Appeals, Eighth Circuit, July 2, 1898.*)

Decisions of State Courts—Uniformity—School Funds in Insolvent National Bank.—Where the treasurer of a school district has illegally deposited its funds in a national bank, and they have become intermingled with the general funds of the bank, after the bank has been declared insolvent, no right is conferred upon the district by the statutes of Iowa to priority of payment out of such general funds over other creditors, and a decision to such effect by the supreme court of the state would not be binding upon a federal court.

Same—Priority.*—In order to establish its right to such priority of payment out of the cash fund, in the hands of the bank's receiver, the school district must prove that such cash has been augmented by the addition thereto of trust funds belonging to it, and wrongfully deposited by its treasurer, and this is not shown by evidence to the effect that the amount claimed was not actual cash deposited, but was represented by checks drawn on the bank itself against an ordinary account, the amount of each being charged on the bank's books against the drawer, and then entered to the credit of the treasurer of the school district.

*See *Midland Nat. Bank v. Brightwell* (Mo.), *ante* and *note*.

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APPEAL by receiver from the Circuit Court of the United States for the Southern District of Iowa. *Reversed.*

A. B. Cummins, for appellant.

P. H. Bousquet, I. M. Earle, and S.¹ F. Prouty, for appellee.

Before SANBORN, and THAYER, Circuit Judges, and SHIRAS, District Judge.

SHIRAS, District Judge. From the record in this case it appears that for some years prior to June, 1895, the First National Bank of Pella, a corporation created under the provisions of the act of congress known as the "National Bank Act," carried on at Pella, Iowa, a banking business until about June 1, 1895, when it was declared to be insolvent, and R. R. Beard, the appellant, was duly appointed receiver thereof by the comptroller of the currency. It further appears that for years previous to the appointment of the receiver the treasurer of the independent school district of Pella city had been in the habit of depositing the funds of the school district in the named bank; the account on the books of the bank being headed, "Treasurer of Independent School District." The moneys thus deposited were not received by the bank as a special deposit, but were treated the same as the moneys paid in by other depositors; being intermingled with the general funds of the bank. When the bank failed, and was placed in the hands of a receiver, the account showed a balance due to the treasurer of the school district of \$4,676.25; and thereupon the independent district brought this proceeding in equity for the purpose of compelling the receiver to recognize the amount as a trust fund belonging to the district, and to pay the same out of the moneys in his hands before paying any dividends to the creditors of the bank, —it appearing that the cash assets of the bank coming into his hands on June 1st amounted to \$8,729.93. Upon the hearing in the circuit court it was

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decreed that complainant was entitled to the relief sought, and that the receiver must pay the amount due the independent district before making a dividend to the other creditors; and the receiver now seeks a reversal of the decree thus entered. The grounds for the conclusion reached by the trial court are very fully and ably set out in the opinion handed down, and reported in 83 Fed. 5, in the course of which the leading cases upon the question of the right to follow and recover trust funds are cited and commented on; and the conclusion is reached that there exists a conflict between the rulings of the supreme court of Iowa and the current of authority in the courts of other states and of the United States, and that, if free to view the question on its merits, the ruling would be against the right to a preferential claim existing in the school district, but, in deference to the rulings of the supreme court of Iowa, the court would hold the right to a preference to be established.

The only provision of the statutes of Iowa which is involved in this case is section 1747 of the Code of Iowa of 1873, which enacts that:

"The treasurer shall hold all moneys belonging to the district and pay out the same on the order of the president, countersigned by the secretary, and shall keep a correct account of all expenses and receipts in a book provided for the purpose."

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Courts—Uniform-
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Funds in Insolvent
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Construing this section, the supreme court of Iowa holds that under its provisions the treasurer of a school district holds the money of the district as a trustee; that he is not authorized to deposit the same in a bank, and by so doing the character of the fund is not changed, and the right exists in the district to follow this trust fund and assert title thereto. District Tp. v. Morton, 37 Iowa, 551; District Tp. v. Smith, 39, Iowa, 10; District Tp. v. Hardinbrook, 40 Iowa, 130; Independent Dist. v. King, 80 Iowa, 497, 45 N. W. 908. The statute does not deal with the question when, and under what circumstances, a right to a trust fund can be

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successfully asserted against the rights of third parties. All that is established by the construction of the statute by the state supreme court is that under its provisions a district treasurer holds the school funds as a trustee, and that he has no legal right to deposit the funds in a bank; but the statute does not undertake to declare that if the money is thus deposited, and is intermingled with the general funds of the bank, the right of the school district to payment out of the general fund is paramount to the rights of all other creditors. If such right exists, it is not created by the statute, but is based upon the general principles of law and equity applicable to the circumstances; and the rulings of the supreme court of Iowa are not conclusive upon the latter question, nor can it be rightfully said that they constitute a rule of property which other courts are bound to follow; and while we concur with the trial court in the general views expressed, touching the desirability of avoiding conflicting decisions between the state and federal courts, we cannot agree with the learned judge below in holding that this consideration requires a decision of the question involved in this case in accordance with the rulings of the supreme court of Iowa, if the same are not in accord with the rules laid down by the supreme court of the United States, or established by the decided weight of authority in the cases decided by the courts of other states. We must not lose sight of the character of this proceeding. The First National Bank of Pella was created under the laws of the United States; and its powers, rights, duties, and obligations, so far as they are dependent upon statutory enactment, are derived from the acts of congress, and not from the statutes of Iowa. Becoming insolvent, the bank was put into liquidation under the provisions of the act of congress, and the receiver was appointed by the comptroller of the currency; and, under the authority conferred on him by the statutes of the United States, he has taken possession of the assets of the bank, and in the distribution thereof he is

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controlled by the laws of the United States. The present bill was filed by the complainant against the receiver in his official capacity, and for the purpose of establishing a preferential claim on the assets of the bank in his hands, in favor of complainant; and the real question is whether the receiver is bound to obey the law as laid down by the supreme court of the United States, or by the supreme court of Iowa, upon the point at issue, assuming for the moment that these courts are at variance thereon. The argument in favor of uniformity of decision, upon which reliance was placed by the trial court, makes in favor of uniformity of ruling among the courts which may be called upon to direct the distribution of the assets of insolvent national banks, which can only be secured by following in all cases the rule laid down by the supreme court of the United States. The question for decision is, what rule should be followed by a receiver of a national bank in distributing the assets of the bank, which have come into his hands under the provisions of the laws of the United States, in cases wherein it appears that trust funds have been received by the bank in the course of its business? The general question of the right to follow trust funds was fully considered by MR. JUSTICE BRADLEY in *Frelinghuysen v. Nugent*, 36 Fed. 229, and the conclusion reached was stated as follows:

“Formerly the equitable right of following misapplied money or property, in the hands of the party receiving it, depended upon the ability of identifying it; the equity attaching only to the very property misapplied. This right was first extended to the proceeds of the property, namely, to that which was procured in place of it by exchange, purchase or sale. But if it became confused with other property of the same kind, so as not to be distinguishable, without any fault on the part of the possessor, the equity was lost. Finally, however, it was held, as the better doctrine, that confusion does not destroy the equity entirely, but converts it into a charge upon the entire mass, giving to the

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party injured by the unlawful diversion a priority of right over other creditors of the possessor.”

Counsel for appellant and appellee concede that the foregoing extract from the opinion of MR. JUSTICE BRADLEY fairly states the rule recognized by the supreme court of the United States, which in *Peters v. Bane*, 133 U. S. 670, 10 Sup. Ct. 354, quoted the same approvingly; and, without further citation of authorities, we may accept the same as a succinct statement of the rule now in force in the courts of the United States.

It is claimed that the supreme court of Iowa has extended the rule as above stated, by holding that where trust funds have been intermingled with the general assets of an insolvent estate, thereby increasing the amount thereof, the person to whom the trust funds belong has a preferential lien, not only upon the specific fund into which it was traced, but upon the general assets of the insolvent estate; and, in support of this claim, reliance is placed on the cases of *Independent Dist. v. King*, 80 Iowa, 498, 45 N. W. 908, and *Dist. Tp. of Eureka v. Farmers' Bank*, 88 Iowa, 194, 55 N. W. 342. It cannot be questioned that the general language found in the opinion in the former case gives support to the contention that it was intended to lay down the broad proposition that, as against the general creditors, the owner of a trust fund passing into the hands of another who becomes insolvent, will have a preferential lien upon the estate of the insolvent; but the decision in the subsequent case of *Dist. Tp. of Eureka v. Farmers' Bank*, *supra*, clearly shows that such is not the doctrine intended to be enunciated by that court. In the latter case one Taylor was carrying on a banking business under the name of the Farmers' Bank of Fontanelle. On the 10th day of December, 1890, the bank being insolvent, Taylor made a general assignment for the benefit of creditors. It appeared that the treasurer of the school district for some years had deposited the money of the district in Taylor's Bank; there being to his credit,

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when the assignment was made, the sum of \$2,303. The school district brought suit in the district court of Adair county, asking that the amount be declared to be a trust fund, and be decreed to be a preferred claim against the property transferred to the assignee of the owner of the bank by the deed of assignment, and the district court entered a decree providing for the payment of the trust money out of any funds which should come into the hands of the assignee. Upon appeal the supreme court reversed the decree in this particular because it appeared that the deed of assignment conveyed to the assignee real property, to the acquisition of which the money of the school district had not contributed, and in the course of the opinion it is said:

"In *Independent Dist. v. King*, 80 Iowa, 498, 45 N. W. 908,—a case in many respects like this,—the identical money deposited was not shown to have been delivered to the assignee; and it was said that, if a trust for the amounts deposited were established, 'it must be on the ground that the deposits must be held to have increased the estate of the insolvents, and that the balance due is represented by an increase now in the hands of the assignee.' * * * It is insisted, however, that the trust fund has been traced into the estate of the insolvent, which is in the hands of the assignee. We do not think it is necessary to trace the deposit into any specific property in the hands of the assignee, in order to establish a trust, but it should be shown—presumptively, at least—that the estate in his hands has been augmented by the trust fund. The equities of plaintiff, as against property to which its money contributed nothing, directly or indirectly, are no greater than those of the general creditor."

Thus we have in this case a construction of the opinion given in the earlier case of *Independent Dist. v. King*; and it is made clear, beyond question, that the supreme court of Iowa does not hold the rule that a trust fund may be declared to be a preferential lien upon the entire estate of an insolvent, into whose hands the trust fund may have come, but such preferential

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lien will be held to exist against any fund or property coming into the hands of an assignee, the amount or value of which has been augmented by reason of the trust fund coming into possession of the assignor. It is difficult to see wherein the rule thus enunciated and applied by the supreme court of Iowa differs from that recognized by MR. JUSTICE BRADLEY in *Frelinghuysen v. Nugent*, *supra*, and approved by the supreme court, to the effect that confusion with other like property, as by intermingling money in a common fund, does not destroy the equity, but converts it into a charge upon the entire mass with which the trust fund has been confused. The foundation of the right on part of the owner of a trust fund to a preference over general creditors in payment out of a fund or estate that has passed to the assignee or receiver of an insolvent person or corporation is, that the trust fund has been wrongfully confused or intermingled with the property of the insolvent, or has been used to increase the value of property, thereby increasing the amount or value of the funds or estate passing into possession of the assignee or receiver; that, if this intermingling had not taken place, the fund passing to the receiver would have been so much less; that the creditors have only the right to subject the property of the debtor to the payment of their claims, and therefore the creditors cannot complain if the total fund coming into the hands of the receiver is reduced by the amount necessary to make good to the owner of the trust fund the sum which was wrongfully used in augmenting the fund or property passing to the receiver. Unless it appears that the fund or estate coming into possession of the receiver has been augmented or benefited by the wrongful use of the trust fund, no reason exists for giving the owner of the trust fund a preference over the general creditors, and this we understand to be the doctrine recognized by the supreme court of Iowa and the supreme court of the United States alike.

In the bill filed in this case it is averred that when

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the bank closed its doors it had on hand cash to the amount of \$8,000, which passed into possession of the receiver; it being further averred that the trust money belonging to the school district, and amounting to \$4,676, formed part of this cash fund. Upon this question of fact the rights of the complainant depend. If this fund, coming into possession of the receiver as part of the assets of the insolvent bank, includes the money belonging to the school district, then the district is entitled to a preference in payment therefrom over the creditors of the bank; but, unless it appears that this fund does include such trust fund, the right to a preference does not exist. The evidence shows that when the bank closed its doors, on June 1, 1895, all the money credited on account to the independent district had been drawn out, and the balance of \$4,676, claimed to be due, grows out of two credits entered on the account,—one for \$614, under date of May 6, 1895, and one for \$4,340, under date of May 13, 1895; and it is admitted that these entries do not represent cash then actually paid into the bank, but represent checks given on the bank itself, the amount of each being charged on the books of the bank against the drawer of the check, and then entered to the credit of the treasurer of the school district. The check for \$4,340 was drawn by the treasurer of Marion county in favor of the treasurer of the school district, and represented taxes collected for school purposes for the benefit of the independent district of Pella. The account kept with the treasurer of the independent district, on the books of the bank, shows that money was drawn out of the bank from time to time for the use and benefit of the school district; and it further appears that were it not for the credit given by reason of the two checks drawn May 6th and May 13th, and aggregating \$4,954, the account would have been overdrawn, and the treasurer of the district would have been in debt to the bank in the sum of \$614. It thus appears that the balance of \$4,676 now claimed by the school district is

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not composed of money actually paid into the bank on May 6th and 13th, whereby the cash assets of the bank were increased to that extent, but this balance is made to appear to be due to the school district by entries upon the books which neither increased nor diminished the cash held by the bank. That this is true will appear from an examination of the daily balance book of the bank, which is in evidence. This shows that on the 11th of May the total cash held by the bank amounted to \$7,949, and the amount then to the credit of the school district was \$707. May 12, 1895, being Sunday, no entry appears for that day. On May 13th the cash balance was \$8,436, or an increase of \$487 over the amount on hand on Saturday, May 11th. The amount to the credit of the school district on the 13th was \$5,047, or an increase over the amount on Saturday, May 11th, of \$4,340,—just the amount of the check drawn by the treasurer of Marion county on the bank, and by it credited to the account of the school district; but the amount of cash held by the bank was not increased by this amount, but remained at just the figure it would have shown if this interchange of credits between the treasurer of Marion county and the treasurer of the school district had not taken place. Under these circumstances, can it be successfully maintained that the cash fund coming into the hands of the receiver has been augmented by the addition thereto of a trust fund belonging to the school district, which may be subtracted from the fund without infringing on the rights of the general creditors? The relation existing between the bank and the treasurer of Marion county was simply that of debtor and creditor. In order to pay the amount of taxes due to the school district, the treasurer of the county drew his check on the bank for the sum of \$4,340, and delivered it to the treasurer of the school district. The fund on which the check was drawn was not a trust fund, and the delivery of the check to the treasurer of the school district, did not change the character of the account against which it was drawn.

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If, after the acceptance of the check by the treasurer of the school district, but before its presentation, the bank had failed and closed its doors, it could not be claimed that the bank held the sum in trust for any one. The only obligation resting on the bank was to pay the check on presentation, and, if not paid, the bank would be indebted for the amount, not as a holder of a trust fund, but as an ordinary debtor. It is claimed in argument that the court must treat the case just as though the treasurer of the school district had presented the check, had obtained the money thereon, and had then deposited the money in the bank as the money of the school district, but this was not in fact done; and as against the creditors, whose money in fact created the cash amount coming into the hands of the receiver, why should fiction be resorted to in order to sustain a preference on behalf of the school district to payment out of a fund not augmented in fact by any sum belonging to the district?

The object of the bill filed in this case is to obtain a preferential payment of the sum of \$4,976 out of the cash fund coming into the hands of the receiver as part of the assets of the bank, and the foundation of the right to a preference is the claim that this fund had been augmented and increased by the addition thereto of a trust fund belonging to the school district. The evidence clearly shows that if the treasurer of the school district had never deposited a cent in the bank, or had closed his account therewith on the 5th day of May, 1895, the sum of money coming into the hands of the receiver on June 1st would have been just the same that did in fact come into his hands; and the evidence therefore does not prove that the cash fund in the hands of the receiver has been augmented or increased by the addition thereto of a trust fund belonging to the school district. If the evidence showed that there had been in the hands of the treasurer of the school district a sum of money which he in fact placed in the bank as an addition to the cash fund which subsequently passed into the hands of the receiver, the school district could make

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claim to this amount as a trust fund, without being required to prove the methods by which the money came into the hands of its treasurer ; but, as the evidence in this case clearly shows that the cash fund coming into the receiver's hands does not include any cash actually paid into the bank by the treasurer of the school district, the complainant, in order to show that it has any claim against the bank, is compelled to avail itself of the action of its treasurer in accepting from the treasurer of Marion county a check drawn on the bank, and against an ordinary account, not containing trust funds, and in having the amount of the check credited to the treasurer of the district. If the treasurer of the district had presented the check to the bank for acceptance, and it had been accepted or certified as good by the bank, but before payment the bank had failed, certainly, if the school district desired to avail itself of a claim against the bank, it could only do so by assuming the position of its treasurer, which would be that of a creditor of the bank, holding an accepted or certified check. It certainly could not assert that the accepted check had become a trust fund, which must be paid in preference to the debts due other creditors. By accepting the check, the bank would bind itself for the payment of the amount thereof ; and, in effect, that was all that was done in this case, in that when the check was drawn the amount thereof was credited up to the account of the treasurer of the school district, and by so doing the bank acknowledged the check to be good, and became bound to pay the amount thereof when called for by the treasurer of the district. The school district can wholly ignore all these dealings between its treasurer and the bank, and, under the decisions of the supreme court of Iowa, can hold its treasurer and his sureties for the amount of school funds coming under his control ; but when, as in this case, the school district endeavors to establish a claim against the bank, it ought not to be allowed to avail itself of the benefit of the transactions between its treasurers and the bank, but avoid their obligations. This case is not one where-

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in it is made to appear that the school treasurer and the bank were in collusion to commit a fraud upon the district, and the actual contest is between the school district and the general creditors of the bank. It is open to the school district to assume the position occupied by its treasurer, and, by acknowledging his acts, become a creditor of the bank for the balance shown to be due to the school treasurer ; but when the district attempts to avoid the position of a creditor, and to assume that of the owner of a trust fund, and as such to assert a preferential right to payment in full out of the cash fund coming into the hands of the receiver, to the detriment of the general creditors, it ought to be held to satisfactory proof of the fact upon which the right to a preference rests, to wit, that the fund coming into the receiver's hands has been augmented and increased by the addition thereto of the trust money, not as a matter of inference, nor as a result of mere entries on books of account, but because the fund or property against which the preference is sought to be enforced has been in fact augmented or benefited by the addition thereto of the trust fund.

To illustrate the situation, let it be assumed that on the 13th day of May, when the check of the treasurer of Marion county was entered upon the books of the bank to the credit of the treasurer of the district, there was no cash then in the bank. Certainly the drawing of the check, and the entry thereof to the credit of the school treasurer, would not have placed in the hands of the bank any cash whatever ; and, had the bank then closed its doors, it would be true that the school district could assert, as against the bank, that the amount due it was a trust fund, yet it would be but a barren claim, because there would be no fund in the hands of the receiver against which a preferential claim could be asserted. Assume, however, that, before the bank closed its doors, some third party had made a deposit of \$5,000 in cash, and this sum had passed to the receiver, as part of the assets of the bank ; would a court of equity be justified in holding that under such cir-

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cumstances the school district could assert a right to payment in full out of this fund, to the exclusion of the creditor of the bank who had created the fund by depositing it in the bank? In the supposed case it would appear, beyond question, that the trust funds belonging to the district had not aided in creating or augmenting the cash fund coming into the receiver's hands, and clearly it would be inequitable to give preference to the claim of the school district over that of the party whose money had in fact created the fund. In substance, that is the situation disclosed by the evidence in this case. As already stated, on the 5th day of May, 1895, the treasurer of the school district had no funds in the hands of the bank, but, on the contrary, the account was overdrawn. On the 6th and 13th days of May, credits on the account were entered, of checks drawn on the bank, which did not add one dollar to the cash in hand or other assets of the bank. The cash fund which passed into the receiver's hands is the balance of the funds on hand on May 5th, of which no part belonged to the school fund, the treasurer's account being then overdrawn, and the cash paid in since May 5th, less the amount paid out; all of the cash paid in coming from sources other than from the treasurer of the school district. It is not sufficient for complainant to show that the account carried on the books of the bank under the heading, "Treasurer of the Independent School District," represented a trust fund, and that the amount shown to be due thereon from the bank was increased by crediting up the checks of the county treasurer. The point at issue is not between the school district and the bank, but it is between the school district and the creditors of the bank, represented by the receiver; and, to entitle the school district to enforce a prior equity or claim against the cash fund in the hands of the receiver, it must prove that this fund has been augmented by the addition thereto of trust funds belonging to the district, and, for the reasons stated, we hold that this has not been

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done ; and therefore complainant is not entitled to a priority of payment out of the funds in the receiver's hands, nor to a prior lien upon the general assets of the bank. The decree appealed from is reversed, and the case is remanded to the circuit court with instructions to dismiss the bill on the merits.

PRONGER

v.

OLD NAT. BANK *et al.*

(*Supreme Court of Washington, March 3, 1899.*)

National Banks—Liability for Ultra Vires Acts.*—A national bank, or other corporation, may be held liable in a civil action, at the suit of the injured party, for every wrong which it commits, however foreign to its nature or beyond its granted powers the wrongful transactions may be, in such cases the doctrine of *ultra vires* having no application.

Action for False Representations—Sufficiency of Evidence.—In an action against a national bank, its president and cashier, for damages arising from fraud alleged to have been perpetrated upon plaintiff by defendants, it appeared that certain notes were the property of the bank ; that the notes were worthless, the payor being insolvent ; and that defendants, without the consent of plaintiff, caused the notes to be forwarded to him, and his account with the bank to be charged with the face value of the notes, falsely representing that the notes were taken for a loan of plaintiff's money made by one of the defendants to the maker of the notes, that the maker was solvent, and that the notes would be paid on demand ; and that plaintiff was injured thereby to the amount of the verdict. *Held*, that the evidence made a *prima facie* case against defendants.

Judgments—Reversal.—The fact that the weight of the evidence may appear to be with the other side is not, alone, sufficient to warrant a reversal of the judgment.

Estoppel.—In such action, it appeared that plaintiff, after he had discovered the fraud, and had tendered the notes back to defendants, treated them as his own, by attempting to negotiate and dispose of them. *Held*, that plaintiff was not estopped by reason of such attempt.

Charge to Jury.—The court's charge to the jury must be read as a whole, and if the whole charge fairly states the law of the case, as applicable to the facts, it will not work a reversal, even though disconnected portions of the charge may state the law too broadly.

*See note at end of case.

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APPEAL by defendants from Spokane county superior court. *Affirmed.*

Stoll & Macdonald and *Jay H. Adams*, for appellants.

Blake & Post, for respondent.

FULLERTON, J. This is an action brought by the respondent against appellants for damages arising from fraud alleged to have been perpetrated upon respondent by the appellants. The acts constituting the fraud charged, as shown by the complaint, are briefly these: The appellant bank is a national bank doing business at Spokane, in Spokane county, and the appellants Glidden and Vincent are respectively president and cashier thereof. That about October 13, 1896, the respondent had on deposit in the appellant bank some \$2,200, which he was desirous of investing in some profitable business; and the appellants, conspiring together to cheat and defraud him of his money, induced him to open a bank at the town of Cheney, in that county, and invest therein \$2,000, promising and agreeing to invest therein a like amount, and such further sums as the exigencies of the business would from time to time demand. That appellants had no intention of making any investment in the Cheney Bank, but made the agreement for the sole purpose of putting off onto the respondent certain worthless paper belonging to the appellant bank. That upon the organization of the Cheney Bank the appellant bank became its correspondent, and furnished the Cheney Bank with monthly statements showing the condition of the account between defendants and the Cheney Bank. That in one of these statements, furnished on the last of March, 1897, it charged the Cheney Bank with two items, one for \$500, under the date of March 15th, and the other of \$1,000, under the date of March 18th, both credited to the O. K. Gold-Mining Company. That upon receiving the statement the respondent made inquiry by telephone of the appellant bank concerning these items, and was told that

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the items represented charges taken from tickets furnished the bookkeeper by the cashier, and that no one present could give any further explanation as to them ; that Vincent, the cashier, was East, and would explain upon his return. That upon the return of Vincent he renewed his inquiry, and was informed that they represented two notes, for the several amounts mentioned, executed to the appellant bank by the O. K. Gold-Mining Company. That Vincent assured him that the payor was solvent, that the notes were as good as any paper the appellant bank had, and would be paid promptly on demand. That the respondent relied on the statements made to him by Vincent, accepted the notes, and gave the appellant bank credit for them. That the notes were the property of the appellant bank, were worthless, and the payor insolvent, all of which was known to the appellants. That the notes were forwarded to him, and representations were made to him, for the sole purpose of cheating and defrauding him out of his money, in pursuance of a conspiracy entered into by the appellants. That, upon learning of the spurious character of the notes, the respondent rescinded the transaction, tendered the notes to appellants, and demanded payment of them, which the appellants refused. That by reason of the frauds he was damaged, etc. The appellants severally demurred to the complaint on the ground that no cause of action was stated. On the demurrers being overruled, they answered jointly, denying the contract and fraud alleged, and, by way of separate answer, averred that the respondent and Vincent entered into a partnership for the conduct of the banking business at Cheney ; that the sum paid the O. K. Gold-Mining Company was paid out, under the directions of Vincent, on a loan made by Vincent to that company of the money of the Bank of Cheney ; and that neither the appellant bank nor Glidden had anything to do with the transaction, further than to transfer the account, under Vincent's direction, on the books of the appellant bank. The respondent replied, denying the new matter alleged.

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On the issues thus made a trial was had, which resulted in a verdict and judgment for respondent for the sum of \$1,536.75.

1. The first assignment of error is that the court erred in overruling the demurrer to the complaint. That the complaint is sufficient as to the appellants Vincent and Glidden is not here seriously disputed. On the part of the bank it is argued that the agreement set forth in the complaint was one of partnership; that the respondent was bound to know that it was beyond the power of a national bank to enter into a partnership agreement, and hence there were no representations on the part of the bank on which he had a right to rely; that, if there is any liability at all on the part of the bank to respondent, it is only on contract to recover a balance of account due from the bank. We think the demurrer was properly overruled. It is true, a corporation, as a merely legal entity, can have no will, and cannot, of itself, act at all. But in its relation to the public it is represented by its officers and lawfully authorized agents, and their acts in the course of corporate dealings are, in law, the acts of the corporation. Whatever the rule may have been formerly, it is now settled beyond controversy that a corporation is liable to the same extent, and under the same circumstances, as a natural person, for the

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consequence of its wrongful acts, and will be held to respond, in a civil action, at the suit of an injured party, for every wrong which it commits, however foreign to its nature or beyond its granted powers the wrongful transactions may be. In such cases the doctrine of *ultra vires* has no application. Bank v. Graham, 100 U. S. 699; Merchants' Bank v. State Bank, 10 Wall. 604; State v. Morris & E. R. Co., 23 N. J. Law, 360; Railway Co. v. Harris, 122 U. S. 597, 7 Sup. Ct. 1286; Alexander v. Relfe, 74 Mo. 495; Buffalo Lubricating Oil Co. v. Standard Oil Co. (N. Y. App.) 12 N. E. 825; Jackson v. Insurance Co. (N. Y. App.) 1 N. E. 539;

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Nevada Bank of San Francisco v. Portland Nat. Bank, 59 Fed. 338 ; Thomp. Corp. §§ 6329, 6279.

2. In the court below, after respondent had rested his case in chief, the appellants challenged the sufficiency of the evidence to sustain a verdict against them, and moved the court to direct a verdict against the respondent. After the evidence was all in, they renewed their objection and motion, and after judgment moved for a new trial, setting up the same ground. These several objections and motions were overruled by the lower court. The appellants in this court earnestly insist that the court erred in so doing. It is insisted (1) that there was no evidence before the jury sufficient to make a *prima facie* case against the appellants ; and, (2) if there was a *prima facie* case made, the evidence of the appellants so overcame the respondent's case as to make it apparent that the jury disregarded the evidence, ignored the instructions of the court, and arrived at their verdict through the influence of passion and prejudice. This calls for an examination of the evidence. We think no useful purpose would be subserved by setting out the evidence in detail, and that it is sufficient to say that the record discloses some evidence from which the jury could reasonably infer that the two notes of the O. K. Gold-Mining Company were the property of the appellant bank; that the payor was insolvent, the notes worthless, and that the appellants, knowing of this, without the consent of respondent, caused the notes to be forwarded to him, and his account with the appellant bank to be charged with the face value of the notes, falsely representing that the notes were taken for a loan of respondent's money made by one of the appellants to the mining company, that the mining company was solvent, and that the notes would be paid on demand; and that the respondent was injured thereby to the amount of the verdict. This would make a *prima facie* case.

Action for False
Representations —
Sufficiency of
Evidence.

On the second proposition nothing is pointed out to us in the record, and we have discovered nothing, other

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than that the weight of the evidence may appear to be against the respondent, which would indicate that the jury were influenced in arriving at the verdict by passion, prejudice, or other arbitrary motive, or that the verdict was not the deliberate judgment of the jury upon the evidence before them. But the fact that the weight of the evidence may appear to be with the other side is not, alone, sufficient to warrant the court in reversing a judgment. To do so for this reason is to usurp the functions of the jury, to make this court the final arbiter on all questions of fact as well as of law, and to deny the constitutional right of a litigant to have the facts of his case determined by a jury. This doctrine has been repeatedly announced by this court. *Graves v. Banking Co.*, 3 Wash. 742, 29 Pac. 344; *Booth v. Railroad Co.*, 6 Wash. 531, 33 Pac. 1075; *Dillon v. Folsom*, 5 Wash. 439, 32 Pac. 216; *Bucklin v. Miller*, 12 Wash. 152, 40 Pac. 732; *Robertson v. Woolley*, 12 Wash. 326, 41 Pac. 48; *Lambuth v. Mill Co.*, 14 Wash. 187, 44 Pac. 148; *Miller v. Bean*, 13 Wash. 516, 43 Pac. 636; *Brown v. Railway Co.*, 16 Wash. 465, 47 Pac. 890; *City of Tacoma v. Tacoma Light & Water Co.*, 17 Wash. 458, 50 Pac. 55. It is true that this court, in the case of *Guley v. Transportation Co.*, 7 Wash. 491, 35 Pac. 372, reversed a judgment rendered on a verdict of a jury because, in the opinion of a majority of the court, the decided weight of the evidence was against the verdict. In that case the court said: "While we shall ordinarily be very slow to interfere with the verdict of a jury where the testimony is conflicting, we do not think justice would be done, were this one allowed to stand. There may be, and sometimes are, cases where the testimony of a single witness, even a child, will outweigh that of many opposed, where there are circumstances of suspicion connected with them. But there was not in this case a single attempt to break down or impeach a witness for the defendant, and much of what they did say that was material was not contradicted by the plaintiff,"

Judgments—
Reversal.

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though he was called in rebuttal. Credible witnesses cannot be set aside in this way, and a verdict supported on the uncorroborated testimony of a single witness, and he the party most interested. Where the clear weight of the evidence is with either side, there is no substantial conflict, and the court should take the case from the jury." Two members of the court dissented from the conclusion reached by the majority, and a strong dissenting opinion was filed. In the subsequent case of *Brown v. Railway Co.*, *supra*, this court, commenting upon the Guley Case, said that it did not favor any extension of the rule announced therein; and in the case of *City of Tacoma v. Tacoma Light & Water Co.*, *supra*, it was said: "We think the court, in *Guley v. Transportation Co.*, went beyond the true rule, in applying it to the facts in that case." In neither of the cases last cited was the Guley Case directly overruled; but, whatever may remain of it as authority, this court will not follow it to the extent of holding that it will, in any case where there is a substantial conflict in the evidence, reverse a judgment founded upon the verdict of a jury, because it may be of the opinion that the weight of the evidence is contrary to the conclusion necessary to be reached in order to sustain the judgment.

3. On cross-examination of the respondent, it was shown that after he had discovered the fraud practiced upon him, and had tendered the notes back to the appellants, he treated them as his own, by attempting to negotiate and dispose of them. Estoppel.

This, the appellants contend, operated to estop respondent from complaining of the fraud, and bars his right to recover in any form of action. But we think the rule is not so broad as the contention of the appellants. There is a wide distinction between an action brought to rescind a contract on the ground of fraud, and an action to recover damages for fraud arising out of a contract. The action to rescind is of an equitable nature, and the party seeking equity must do equity. On discovering the fraud, the party injured must tender

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back to the other party the benefits of the contract, so far as received by him, and place the other party as nearly as possible in *statu quo*. He must act promptly, keep his tender available, and bring his action without unreasonable delay. The action for damages is a law action for a money judgment, requires no tender, and may be brought by the injured party at any time within the statute of limitations. Nor does an affirmation of the contract after discovery of the fraud extinguish the right to an action for damages on account of the fraud. An affirmation bars only the right to rescind. All other remedies remain unimpaired. *Love v. Oldham*, 22 Ind. 51; *Vineyard Co. v. Tuohy*, 107 Cal. 243, 40 Pac. 386; *Hunt v. Blanton*, 89 Ind. 38; *Sackman v. Campbell*, 15 Wash. 57, 45 Pac. 895; *Kerr, Fraud & M. p.* 330. The present action is of the latter class, and was so recognized by the learned judge who presided at the trial of the cause in the court below. His refusal to instruct the jury, as requested by appellants, to the effect that such conduct on the part of respondent barred his right to recover, was not error.

4. A part of the charge of the court to the jury was as follows: "The issues for you to try are: (1) Whether or not the defendants, or any of them, entered into the fraudulent scheme or conspiracy alleged in the complaint; (2) whether or not, in pursuance of such fraudulent scheme or conspiracy, if you find from the evidence such existed, defendants, or either of them, induced plaintiff to deposit his money in the defendant the Old National Bank, and to receive therefor the two notes of the O. K. Gold-Mining Company, mentioned in the complaint; (3) if you find from the evidence that such conspiracy or fraudulent scheme existed, and that through the same the plaintiff was induced to take the two said notes, then you must find from the evidence what, if any, damages plaintiff suffered thereby. * * * It is not necessary, for the plaintiff to recover, that the exact fraud alleged in the complaint be proven. It will be sufficient if the defendants, or either of them, by agreement or understanding, expressed or implied,

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by fraudulent means, substantially as alleged in the complaint, deprived the plaintiff of his money. * * * If you find from the evidence that the defendants, or any of them, were guilty of the fraud complained of and set forth in plaintiff's complaint, and that by reason thereof the plaintiff was induced to take the two O. K. Gold-Mining Company notes mentioned, and the defendants, or any of them, took and received therefor any of the plaintiff's money, then you must find for the plaintiff in the sum of money so taken by the defendants, or either of them. * * * If you find further from the evidence that the State Bank of Cheney was so charged with said notes through and by virtue of the fraud of the defendants, or either of them, as alleged in the complaint, then the plaintiff would be entitled to recover in this suit the difference between the sum so charged and the actual value of said notes." It is objected by the appellants that these instructions were erroneous because under them the jury were authorized to find the appellants guilty of fraud not alleged in the complaint, and, if they found one or more of the appellants guilty of the fraud charged, they were authorized to find a verdict against each and all of the defendants. Standing alone, this part of the charge may be subject to the criticism of the appellants. But it is a familiar principle of law that the court's charge to the jury must read as a whole, and if the whole charge fairly states the law of the case, as applicable to the facts, it will not work a reversal, even though disconnected portions of the charge may state the law too broadly. It is not practicable for the court to incorporate in each paragraph of the instructions the exceptions and modifications of the general rules therein announced. To do so would lead to prolixity, and tend rather to mislead and confuse the jury than to enlighten them. In this case, as a limitation upon his general statement, the court distinctly told the jury that they were authorized to find for or against any one or more of the defendants according as they should determine the evidence warranted, and at

Charge to Jury.

Note

the request of the appellants charged: "You can render a verdict in this case in favor of the plaintiff against any one or more of defendants, but you cannot render a verdict against any of the defendants against whom there is not clear and positive proof. I advise you further, as a matter of law, that if the plaintiff has not proved a case of express fraud, such as I have heretofore defined to you, involving knowledge on the part of the defendants, and the willful and corrupt purpose on their part to cheat and defraud plaintiff, the plaintiff cannot recover. He cannot recover upon any other cause of action or theory, except that set forth in the complaint." As thus modified, we do not think that the general statement of the court in the instructions complained of could have in any wise misled the jury.

5. The appellants complain of certain rulings of the court made at the time of the trial, in the admission and rejection of evidence. A careful inspection of the record does not disclose error sufficiently prejudicial in such rulings to warrant a reversal of the case. The judgment will be affirmed.

GORDON, C. J., and DUNBAR, ANDERS, and REAVIS, JJ., concur.

NOTE.

Liability of Corporation for Wrongs—Ultra Vires.—The doctrine of *ultra vires* has no application to the wrongs done by a corporation; hence corporations are liable for every wrong of which they are guilty. *Philadelphia W. & B. Co. v. Quigley*, 21 How. (U. S.) 209; *Green v. London Omnibus Co.*, 7 C. B. 290; *Life & Fire Ins. Co. v. Mechanics' Ins. Co.*, 7 Wend. (N. Y.) 31; *First Nat. Bank v. Graham*, 100 U. S. 699; *Bissell v. Michigan Southern, etc., R. Co.*, 22 N. Y. 258; *Salt Lake City v. Hollister*, 118 U. S. 256; *Alexander v. Relfe*, 74 Mo. 495; *South, etc., R. Co. v. Chappell*, 61 Ala. 527. In this last case it was said: "It is not necessary, to fix the liability, that the wrongful act, or the negligence from which the injury proceeds, should have been committed while the corporation was in the exercise of the powers conferred by its charter. It may have been committed while the corporation, or its servants or agents, acting under its authority, were exceeding corporate power or engaged in business or transactions wholly foreign to its nature."

Corporations are liable for every wrong of which they are guilty, and in such cases, the doctrine of *ultra vires* has no application. *Merchants' Nat. Bank v. State Nat. Bank*, 10 Wall. (U. S.) 604.

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In New York, etc., *R. Co. v. Schuyler*, 34 N. Y. 30, it is said that a corporation is liable to the same extent, and under the same circumstances, as a natural person, for the consequences of its wrongful acts, and will be held to respond in a civil action, at the suit of an injured party, for every grade and description of forcible, malicious or negligent tort, or wrong, which it commits, however foreign to its nature or beyond its general powers the wrongful transaction or act may be.

But see *Hood v. New York, etc., R. Co.*, 22 Conn. 1, 22 Conn. 502, 23 Conn. 609, and *Bathe v. Decatur County Agricultural Soc.*, 73 Iowa 11, 5 Am. St. Rep. 651.

AMERICAN NAT. BANK OF DENVER

v.

HAMMOND.

(Supreme Court of Colorado, Oct. 10, 1898.)

False Representations—Ultra Vires—Bank's Liability.*—Although it was no part of the business of the defendant bank to make representations or statements regarding the financial responsibility of C., or the value of certain mining stock, if they were false, and made in pursuance of an agreement with C., and indirectly for the benefit of the bank, and such benefit was received and retained by the bank, it could not escape liability upon the ground that it was *ultra vires* on its part to make the representations.

Same—Reliance.—The representations attributed to the bank officials related to matters regarding which, from the nature of the previous transactions between C. and the bank, they would be presumed to have knowledge; and plaintiff was not chargeable with notice of facts tending to cast doubt upon the truth of the representations. *Held*, that plaintiff was justified in relying upon such representations.

Instructions—Evidence.—It appearing from the evidence that no statements regarding the solvency of C. were made to plaintiff, a question on such subject should not have been submitted to the jury.

Reliance.—False representations not relied upon cannot be made the basis of an action for damages.

Question for Jury.—As it could not be said, as a matter of law, that the statements of the bank's officer as to the value of the stock were mere expressions of opinion, and not statements of facts, or *vice versa*, a question on the subject should have been submitted to the jury.

Same—Measure of Damages.—In such actions, damages are limited to the natural and proximate consequences of the acts complained of; and those results are proximate which the party charged with such acts must have contemplated as the probable consequences arising therefrom.

*See *Pronger v. Old Nat. Bank et al.* (Wash.), *ante* and *note*.

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APPEAL by defendant from Arapahoe county district court. *Reversed.*

Appellee, as plaintiff below, seeks to recover from appellant the balance due upon the purchase price of the contents of a drug store, sold by him to Edward and Frank Crowl, and bases his right upon the following facts, claimed by him to have been established at the trial: That, at the time negotiations for the sale were pending, the latter referred him to appellant for information regarding their financial responsibility, and the value of mining stock which they proposed to pledge as collateral for the payment of the balance of the purchase price; that at this time the Crowls were indebted to appellant, which indebtedness was secured by mining stock of the same company which they proposed to pledge appellee; that an agreement existed between them and the bank that they should refer the appellee to it for the above information, and that it should recommend them to him as solvent persons, and the mining stock good security for the amount for which he expected to extend them credit in the transaction, so that the Crowls might be enabled to purchase from him, who, in turn, were to pledge the property thus obtained as security for the indebtedness due from them to appellant; that he applied to the bank for this information, and that, pursuant to this agreement, appellant represented to him that the Crowls were solvent, and the mining stock valuable, and good security for the amount for which he expected to accept it as collateral, which representations were false, and known by appellant so to be, and made for the purpose of inducing him to sell to the Crowls, in order that it might be benefited in the manner above indicated; that, relying upon the truth of these statements, he consummated the deal with the Crowls, and received from them the mining stock in question as security for the unpaid balance of the purchase price; that, on the consummation of the deal between himself and the Crowls, the latter pledged to appellant the property purchased, and that it has taken possession of

Case Stated.

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and sold it; that the Crowls are insolvent, and the mining stock of no value; and that he is unable to collect from them the unpaid balance for the property so sold. At the trial appellant offered to prove that the property purchased was not worth the sum for which appellee had sold it, which offer was refused; and, *inter alia*, the court instructed the jury that the measure of damages, in case they found for the appellee, would be the amount for which he gave credit to the Crowls upon the sale, with interest. There was a verdict and judgment for appellee. Such further reference to the record and evidence as may be necessary for an understanding of the questions decided will be found in the opinion.

T. J. O'Donnell, W. S. Decker, and Milton Smith, for appellant.

Cranston, Pitkin & Moore and T. E. Watters, for appellee.

GABBERT, J. (after stating the facts). Of the numerous errors assigned by appellant, it is only necessary to pass upon those included in the following propositions suggested by its counsel: First. That it was no part of the business of the bank to make representations regarding the financial condition of the Crowls, or the value of the mining stock, and, therefore, it is not liable for the statements of its officers in this respect; that the evidence does not establish the allegations of the complaint; that appellee was not justified in relying upon the statements of the bank officials respecting the Crowls and their mining stock; and that the statements attributed to these officials were but mere expressions of opinion or belief, and therefore not actionable. Second. That the court erred in its instruction regarding the measure of damages, and in refusing to permit appellant to introduce evidence touching the value of the stock of merchandise.

1. A corporation must act through its agents, who can only bind it within the scope of the powers for which

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it was created (Cooley, Torts [2d Ed.] 136 ; Weckler *v.* Bank, 42 Md. 581); but where, through its agents, assuming to act in its behalf, it reaps and retains the fruits of an unauthorized transaction, this doctrine is no longer applicable, for it cannot interpose the defense of *ultra vires*, and still retain the benefits thus acquired (American Nat. Bank *v.* National Wall-Paper Co., 23 C. C. A. 33, 77 Fed. 85; Thomp. Corp. §§ 6015, 6016). It was no part of the business of appellant to make representations or statements regarding the financial responsibility of the Crowls, or the value of the mining stock, and for such representations alone it could not be held liable; but, coupled with the agreement said to have existed between it and the Crowls, and the alleged object of the bank in aiding them to secure the property of appellee, in connection with its acts in subsequently acquiring this property for its own benefit, it cannot escape liability upon the ground that the transaction was not within the scope of its corporate powers, and, if the facts upon which appellee relies were established, he was clearly entitled to recover the damages sustained by reason of the acts of appellant.

Relative to the proposition that the evidence does not establish the facts upon which appellee relies for a recovery, it is not necessary to notice the testimony, except in so far as its sufficiency or materiality bears upon the issues. If sufficient in this respect, it was the province of the jury to determine the facts, and, if the testimony supports the issues tendered by the complaint, the verdict and judgment cannot be disturbed upon this ground; so that a disposition of this question depends upon the views expressed on the remaining ones, included in the first proposition advanced by counsel for appellant. It appears that the representations attributed to the bank officials related to matters regarding which, from the nature of the previous transactions between the Crowls and the bank, they would be presumed to have knowl-

False Representations—*Ultra Vires*
—Bank's Liability.

Same—Reliance.

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edge. There was nothing in the transaction, nor does appellee appear to have possessed any information, which would have aroused his suspicions, or cast doubt upon the truth of the statements claimed to have been made by the bank officers; and he was therefore justified in relying upon them, in so far as the law recognizes them of that character that their falsity may be actionable. 2 Pom. Eq. Jur. (2d Ed.) §§ 891, 892. The general rule is that a representation cannot form the basis of an action for falsity unless it relates to a matter of fact, as distinguished from opinion. The difficulty arises in making the distinction. The true rule appears to be that a fraudulent misrepresentation cannot itself be the mere expression of an opinion entertained by the party making it; but where such party makes a statement which might otherwise be only an opinion, and does not state it as the mere expression of his opinion, but affirms it as a fact, material to the transaction to which it relates, so that the person to whom it is addressed may reasonably treat it as a fact, and rely and act upon it accordingly, then such statement becomes an affirmation of a fact, within the meaning of the general rule, and may be a fraudulent misrepresentation. 2 Pom. Eq. Jur. (2d Ed.) § 878. If the representations are of such character that they will bear either the construction that they were expressions of opinion or statements of fact, the question which they were must be decided by the jury (3 Suth. Dam. [2d Ed.] § 1167; *Teague v. Irwin*, 127 Mass. 217; *Sterne v. Shaw*, 124 Mass. 59); but, in order to justify a finding that they were representations of fact, they must be statements susceptible of knowledge, as distinguished from opinion (3 Suth. Dam. *supra*; *Sterne v. Shaw*, *supra*; *Nounnan v. Land Co.*, 81 Cal. 1, 22 Pac. 515; *Williams v. McFadden*, 23 Fla. 147, 1 South. 618; *Parker v. Moulton*, 114 Mass. 99).

Precisely what conversation occurred between the bank officials and appellee regarding the Crows, as

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detailed by appellee himself, is not altogether clear.

Instructions—
Evidence. He says, when he went to the bank, that he wanted to know if the Crowls were reliable men, *i. e.* trustworthy. It nowhere appears that he asked any questions of these officers regarding the solvency or responsibility of these parties, *viz.* their ability to pay debts or means of paying obligations they might incur. He also states that he told one of these officers that he came to inquire about the value of the mining stock, and the response, so far as it related to the Crowls, was to the effect that they were all right in a business way, and that their transactions with the bank were satisfactory; that to the other official his inquiries, in substance, were that he had been referred by the Crowls to the bank for information as to their financial standing and the value of the stock, to which the reply with reference to the Crowls was that they were all right, or that he would find them all right, and that the bank's business dealings with them had been satisfactory. From his own statements, it is apparent that the information he sought related to the mining stock particularly; for he says, after this last conversation, he thanked the party with whom it was had for the information received, and stated to him, with reference to the mining stock, that it was information he could rely upon, knowing the bank held some of the same security, and later in his testimony stated that he did not deem it necessary to make any inquiry of the Crowls about what property they owned, because he thought the mining stock was sufficient, after the information regarding it was obtained from the bank. According to the testimony of appellee, it is evident that no statements regarding the solvency of the Crowls were made to him by the bank officers. His inquiries on this subject were so vague and indefinite that it is impossible to ascertain what information he was seeking in this respect; and it was therefore error to submit this question to the jury, for they may have been led thereby to believe there was testimony tending to prove the contention of

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appellee that he had been falsely informed by the bank officers regarding the solvency of the Crowls. Railroad Co. v. Liehe, 17 Colo. 280, 29 Pac. 175; Burlock v. Cross, 16 Colo. 162, 26 Pac. 142. Further, if he did not rely upon any information received from the bank officers regarding the solvency of the Crowls, he cannot make their representations in this respect the basis of an action for damages, even though such statements may not have been true. 2 Pom. Eq. Jur. (2d Ed.) § 890.

Reliance.

With reference to what was said by appellee and the bank official with whom he talked regarding the mining stock, the testimony is conflicting, but, taking the version of appellee, it was to the effect that he told this officer that he came there to make inquiries about this stock and the company; that he knew the bank held some of the same security, and that he wanted information that he could rely upon; that the Crowls were strangers to him, and that he did not propose to let his store go unless satisfied regarding the security; that he was told by this officer that it would be all right, and that the number of shares he proposed to take ought to be ample security for the amount which they were intended to secure; that he then thanked him for the information, and said that he could and would rely upon it. The value of the mining stock was a subject upon which an opinion could be expressed, or a statement made as a matter of fact. In the light of all the circumstances surrounding the transaction, it cannot be said, as a matter of law, that the statements of the bank officer regarding the stock, as detailed by appellee, were mere expressions of opinion or belief, and not statements of fact, or *vice versa*; and this question should have been submitted to the jury, under appropriate instructions, to determine which they were, from all the evidence in the case.

Question for Jury.

2. Damages are limited to the natural and proximate consequences of the acts complained of (2 Greenl. Ev.

Auten v. U. S. Nat. Bank of New York

§ 256); and those results are proximate which the party charged with such acts must have contemplated as the probable consequences arising therefrom (*Crater v. Binninger*, 33 N. J. Law, 513). If the facts are established which render the appellant liable; it can only be called upon to respond in such sum as equals the damages which appellee has sustained resulting from the acts charged. By the acts of its officers, if established as contended by appellee, appellant has obtained his property, the natural and proximate results which they must have contemplated as the probable consequences of their acts in the premises; and the bank is therefore only responsible to him, if liable at all, for the value of this property at the time of its transfer, less whatever sum could be treated as a payment by the Crowls to him and the value of the mining stock taken as security. Appellee would also be entitled to damages in a sum equal to legal interest on such balance. *Refining Co. v. Tabor*, 13 Colo. 41, 21 Pac. 925. The judgment of the district court is reversed, and the cause remanded for a new trial. Reversed and remanded.

Same—Measure of
Damages.

AUTEN

v.

UNITED STATES NAT. BANK OF NEW YORK.

(*Supreme Court of the United States, April 24, 1899.*)

National Bank—Action against Receiver—Jurisdiction.*—Where the action is against one of the defendants as the receiver of a national bank appointed by the comptroller of the currency, it is against a federal officer, and one under the laws of the United States, and federal jurisdiction cannot depend upon diversity of citizenship.

Banks—Rediscounting—Power to Borrow.*—The very object of banking is to aid the operation of the laws of commerce by serving as a channel for carrying money from place to place as the rise and fall of supply and demand require, and this may be done by rediscount-

*See notes at end of case.

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ing the bank's paper, or by some other form of borrowing; and it cannot be held as matter of law that such transactions are out of the usual course of banking business, and charge every body connected with them with knowledge that they may be in excess of authority.

Negotiable Notes—Title of Holder—Notice.—By the rule that an individual negotiating for the purchase of a note from one having it in possession, and whose name is upon it, must assume that the title of the holder, as well as the liability of all prior parties, is precisely that indicated by the paper itself, it is not meant that circumstances may not explain the note or may not relieve the taker from the obligation of inquiry.

Same—Implied Authority of President to Rediscount.—In an action against the receiver of an Arkansas bank by a New York bank, on certain negotiable notes, it appeared that the notes were rediscounted and delivered to plaintiff by the president of the Arkansas bank, and upon each, as part of its endorsement, was the individual signature of the president followed by the endorsement of the bank through its president; that the discounting of such notes was one of many transactions of the same kind between the banks, and was not other than such as take place between banks carrying on a legitimate banking business; that it was not only the custom of the Arkansas bank to rediscount its paper, but it was the custom of other banks where it was located to do so; and that all the correspondence between the banks in regard to the transaction in question was carried on by the president, except its beginning and the acknowledgment of its close by accepting the credit which had been created by the transaction for the Arkansas bank, which was through the Arkansas bank's cashier, who it was conceded, had power to rediscount its paper. *Held*, that, in judging of the conduct and rights of plaintiff, the question was not what actual authority the president had, but what appearance of authority he was given or permitted by the bank's directors; and that a verdict was properly directed for plaintiff.

Set-Off.—Under the statute of Arkansas, Gould, Dig. Ark. p. 1020, § 5, in an action at law against the receiver of a national bank, defendant may set off against plaintiff's demand a debt due the bank by plaintiff, and thereby have the amount due plaintiff reduced.

ERROR by defendant to the United States Circuit Court of appeals for the Eighth Circuit. *Affirmed.*

Two of the parties to this action in the court below were national banks, —one located at New York; the other located at Little Rock, Ark. Sterling R. Cockrill, as receiver of the latter bank, was also a party. He resigned, and plaintiff in error was appointed. The banks will be denominated, respectively, the "New York Bank" and the "Little Rock Bank."

Case Stated.

Auten v. U. S. Nat. Bank of New York

The complaint contains the necessary jurisdictional allegations, and that "on December 7, 1892, the City Electric Street-Railway Company, a corporation organized and doing business under the laws of Arkansas, in the city of Little Rock, Arkansas, executed and delivered to G. R. Brown and H. G. Allis, citizens of the state of Missouri, its three promissory notes, each for five thousand dollars, payable four months after date, with interest at the rate of ten per cent. per annum from maturity until paid. Said Brown and Allis afterwards indorsed and delivered said notes to the defendant, First National Bank, and said bank, before maturity and for a valuable consideration, indorsed, rediscounted, and delivered said notes to plaintiff. That on December 7, 1892, the McCarthy & Joyce Company, a corporation resident in the city of Little Rock, Pulaski county, Arkansas, and organized and doing business under the laws of Arkansas, executed and delivered to James Joyce, a citizen of the state of Missouri, its two promissory notes, each for five thousand dollars, payable to his order at four and five months, respectively, after date, with interest from maturity at the rate of ten per cent. per annum until paid. Said Joyce afterwards indorsed said notes to the defendant, First National Bank, and said bank, before maturity and for a valuable consideration, indorsed, rediscounted, and delivered said notes to plaintiff. Said notes were each at maturity presented at the First National Bank in Little Rock, Arkansas, for payment, and, payment being refused, they were each duly protested for non-payment; the fees for which, amounting to twenty-five dollars, were paid by plaintiff. Copies of said notes, with the indorsements thereon, are hereto attached, marked 1 to 5, inclusive, and made part hereof. No part of said notes has been paid, and the same have been presented to the receiver of said bank for allowance, which he has refused to do."

Judgment was prayed for the debt and other relief.

Three of said notes are in the following form :

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“\$5,000.

34,131.

“Little Rock, Ark., Dec. 7th, 1892.

“Four months after date we, or either of us, promise to pay to the order of G. R. Brown and H. G. Allis five thousand dollars, for value received, negotiable and payable, without defalcation or discount, at the First National Bank of Little Rock, Arkansas, with interest from maturity at the rate of ten per cent. per annum until paid.

“City Electric St. Ry. Co.

“H. G. Bradford, Pt.

“W. H. Sutton, Sec’y.

“No. A, 73,485. Due Apr. 7-10, '93.”

The following indorsement appears on each: “Geo. R. Brown; H. G. Allis; First National Bank, Little Rock, Arkansas, H. G. Allis, Pt.”

Two of the notes were in the following form :

“\$5,000.

34,128.

“Little Rock, Ark., Dec. 7, 1892.

“Four months after date we, or either of us, promise to pay to the order of James Joyce five thousand dollars, for value received, negotiable and payable, without defalcation or discount, at the First National Bank of Little Rock, Arkansas, with interest from maturity at the rate of ten per cent. per annum until paid.

“McCarthy & Joyce Co.

“Geo. Mandlebaum, Secy. & Treas.

“A, 73,477. No. 2. Due Apl. 7-10, '93.”

They were indorsed as follows: “James Joyce; H. G. Allis; First National Bank, Little Rock Ark., H. G. Allis, Pt.”

The receiver only answered, and his answer, as finally amended, denied that “either of the notes described in the plaintiff’s complaint was ever indorsed and delivered to the First National Bank; he denies that either of said notes was ever the property of, or in the possession of, said bank, and denies that the said bank ever indorsed or delivered either of said notes to the plaintiff; he denies that said bank ever received any consideration from said plaintiff for any indorsement

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or delivery of said notes to it"; and averred "that the name of the defendant bank was indorsed on said notes by H. G. Allis for his personal benefit, without authority from said bank; that the said Allis, assuming to act for defendant bank, procured the plaintiff to advance or loan upon said notes a large sum of money, which he appropriated to his own use; that said Allis had no authority from said bank to negotiate said loan or to act for it in any way in said transaction; if said transaction created an indebtedness against the defendant bank, then the total liability of said defendant bank to the plaintiff by virtue thereof exceeded one-tenth of the plaintiff's capital stock, and the total liability of the defendant bank thereby exceeded the amount of its capital stock actually paid in; that the plaintiff knowingly permitted its officers to make such excessive loan under the circumstances aforesaid; that the transaction aforesaid was not in the usual course of banking business, which either the plaintiff or the defendant bank was authorized to carry on; that the plaintiff is not an innocent holder of either of said notes; that the defendant bank received no benefit from said transaction; that it had no knowledge thereof until a few days prior to its suspension; that no notice of the dishonor of said notes was ever given to the defendant bank." Also that "at the date of the suspension of the First National Bank the United States National Bank was indebted to it in the sum of \$467.86, that sum then being on deposit in the said United States National Bank to the credit of the First National Bank of Little Rock, and that the same has never been paid."

The receiver prayed that "he be discharged from all liability upon the notes sued on herein, and that he have judgment against the plaintiff for the said sum of \$467.86, and interest from the 1st day of February, 1893."

The plaintiff bank denied the indebtedness of \$467.86, and averred "that at the time said First National Bank failed it was indebted to plaintiff in a large amount, to wit, the notes sued upon herein, and plaintiff applied said \$467.86 as a credit upon said indebtedness."

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The issues thus made up were brought to trial before a jury. Upon the conclusion of the testimony, the court, at the request of the plaintiff bank, instructed the jury to find a verdict for it, and denied certain instructions requested by the defendant. The jury found for the plaintiff, as instructed, for the full amount of the notes sued, less the amount of the set-off, and judgment was entered in accordance therewith.

A writ of error was sued out to the circuit court of appeals, which affirmed the judgment, and the case was brought here.

There had been two other trials, the rulings in which and the action of the circuit court of appeals are reported in 27 U. S. App. 605, 13 C. C. A. 472, and 64 Fed. 985, and 49 U. S. App. 67, 24 C. C. A. 597, and 79 Fed. 296.

The defendant assigns as error the action of the circuit court in instructing the jury to find for the plaintiff bank, and in refusing the instructions requested by the defendant. The latter were 19 in number, and present every aspect of the defendant's defense and contentions. They are necessarily involved in the consideration of the peremptory instruction of the court, and their explicit statement is therefore not necessary.

The evidence shows that the New York bank solicited the business of the Little Rock bank by a letter written by its second assistant cashier, directed to the cashier of the Little Rock bank, and dated June 21, 1892.

Among other things, the letter stated: "If you will send on \$50,000 of your good, short-time, well-rated bills receivable, we will be pleased to place them to your credit at 4 per cent."

The reply from the Little Rock bank came, not from its cashier, but from its president, H. G. Allis, who accepted the offer, and inclosed notes amounting to \$50,728, among which were three of the City Electric Railway Company, the maker of three of the notes in controversy. When first forwarded, they

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were not indorsed, and had to be returned for indorsement. They were indorsed, and the letter returning them was signed by Allis. To the letter forwarding them the New York bank replied as follows:

“New York, June 27th, 1892.

“H. G. Allis, Esq., President, Little Rock, Ark.—
Dear Sir: We have this day discounted the following notes contained in favor of the 24th inst., and proceeds of same placed to your credit.”

The notes were enumerated, their amounts calculated and footed up, and discount at 4 per cent. deducted, and the proceeds, amounting to \$50,216.48, placed to the credit of the Little Rock bank.

On July 6, 1892, the following telegrams were exchanged:

“New York, July 6th, 1892.

“First National Bank, Little Rock, Ark.: Will give you additional fifty thousand on short-time, well-rated bills, discounted at five per cent. Money rates are little firmer. Answer, if wanted.

U. S. Nat. Bank.”

“Little Rock, Ark., July 6, 1892.

“United States Nat. Bank, N. Y.: We can use fifty thousand additional at five per cent. Will send bills to-morrow.

“First Nat. Bank.”

In accordance with the proposition thus made and accepted, H. G. Allis, as president, wrote on the 9th of July, 1892, to the New York bank a letter, inclosing what he denominated “prime paper, amounting to \$50,301.88,” and requested proceeds to be placed “to our credit, and advise.” These notes were discounted and acknowledged. Their proceeds, less discount, amounted to \$49,641.68.

On July 26, 1892, the New York bank telegraphed:

“New York, July 26th, 1892.

“First National Bank, Little Rock, Ark.: Can take fifty thousand more of your well-rated bills, discounted at five per cent.

“U. S. Nat. Bank.”

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To this H. G. Allis, as president, answered as follows:

“Little Rock, Ark., July 29, 1892.

“United States National Bank, New York City—
Gentlemen: Your telegram of the 26th, saying you could take \$50,000 more short-time, well-rated paper, I placed before our board to-day.

“While it is two weeks earlier than we need it, on account of the rate we will take it now, and I inclose herein paper as listed below; amount, \$50,089.93.

“Yours, very truly, H. G. Allis, President.

“We hold collaterals subject to your order; see (pencil) notations on paper for rating.

“H. G. Allis, Pr.”

In the list of notes were two by the city Electric Street-Railway Company and two by the McCarthy & Joyce Company, who were the makers of two of the notes in controversy. There was one by N. Kupferle for \$5,000, “due Nov. 8, 1892.” The significance of this will be stated hereafter.

These notes were discounted, and the fact communicated to H. G. Allis, Esq., president, Little Rock, Ark.

The next letter contains notes for discount from the Little Rock bank, sent by its cashier, W. C. Denney. The proceeds amounted to \$24,413.05, acknowledgment of which was made.

The next communication was about the notes in controversy. It was dated November 25, 1892, and was signed by W. C. Denney, cashier. The letter, however, inclosing the notes, was sent by H. G. Allis, as president. The correspondence is as follows:

“The First National Bank of Little Rock, Ark.

“Nov. 25, 1892.

“United States National Bank, New York City—
Gentlemen: Kindly advise us if you can give us \$25,000 more in discounts. We have not decided whether we will make further discounts this year, although it is more than probable that we will have to, as our cotton men do not want to sell at present.

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"We believe the advance in price will cover shortage of crop, and that our collections will be equal to those of last year. If our cotton men continue to hold their cotton, it will be necessary for us to make further rediscounts, and we want to know what we can do in case they refuse to sell.

"If you can grant us this favor, kindly let us know what rate of interest you will want. Your immediate reply is requested.

"Yours, very truly, W. C. Denney, Cashier."

"New York, Nov. 28, 1892.

"Mr. W. C. Denney, Cashier, Little Rock, Ark.—Dear Sir: Yours of the 25th is to hand.

"We will give you the additional discounts as requested. You may send on your paper, and we will put same to your credit at 6%.

"Yours, very truly, H. C. Hopkins, Cashier."

"Little Rock, Ark., Dec. 13, 1892.

"United States Nat. Bank, New York City—Gentlemen: In accordance with our letter of the 25th ult., and your reply of the 28th ult., we find that we shall need some more money, as our cotton men are not shipping out any cotton. It seems to be the inclination of all of them to hold for a better price, and we are now carrying \$175,000 in demand loans on cotton, which we may have to carry two or three months longer.

"We inclose herein paper as scheduled below. Kindly wire us proceeds to our credit, and oblige,

"Yours, very truly, H. G. Allis, President.

Dickenson Hardware Co., due March 3.....	\$2,500 00
Dickenson Hardware Co., due April 6.....	5,000 00
City Electric St. Ry. Co., due April 10.. . . .	5,000 00
City Electric St. Ry. Co., due April 10.....	5,000 00
City Electric St. Ry. Co., due April 10.....	5,000 00
McCarthy & Joyce Co., due May 10.....	5,000 00
McCarthy & Joyce Co., due April 10.....	5,000 00

\$32,500 00

"We hold all collaterals recited subject to your order and for your account."

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"New York, Dec. 16th, 1892.

"H. G. Allis, Esq., Prest., Little Rock, Ark.—
Dear Sir: We have this day discounted the following
notes contained in your favor of the 13th inst., and
proceeds of same placed to your credit:

Dickenson Hardware Co., due	Mch. 3, '93.....	\$2,500, disct.	\$32 08
do do	" Apl. 6, '93.....	5,000, "	92 50
City Electric St. Ry. Co.	" 10,	5,000, "	95 83
" do	" 10,	5,000, "	95 83
do do	" 10,	5,000, "	95 83
McCarthy & Joyce Co.	" 10,	5,000, "	95 83
do do	May 10,	5,000, "	120 83

Amount of notes..... \$32,500
Less discount at 6 per cent..... 628 73

Proceeds.....\$31, 871 27

"We inclose herewith note of Dickenson Hardware
Co. \$5,000, due Apl. 6th, for insertion of amount in
body, and return to us.

"Yours, truly,

"Jno. J. McAuliffe, Asst. Cashier."

"New York, December 17, 1892.

"First National Bank, Little Rock, Arkansas: Let-
ter thirteen received notes discounted proceeds credited
account.

"United States National Bank."

"The First National Bank of Little Rock, Ark.

"Dec. 20, 1892.

"United States National Bank, New York City—
Gentlemen: We have your favor of the 16th inst.,
inclosing the Dickenson Hardware Company note for
completion, which we herewith return.

"We charge your account with \$31,871.27, proceeds
of \$32,500.00 of discounts.

"Yours, very truly, W. C. Denney, Cashier."

In the subsequent correspondence Allis takes part
but once, and sent the following telegram, December
21, 1892:

"Little Rock, Ark., Dec. 21, 1892.

"U. S. Natl. Bank, N. Y.: Can you discount
thirty thousand country banks' paper secured by

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cotton thirty days no renewal desire to carry over holidays answer day message.

“H. G. Allis, President.”

Henry C. Hopkins, cashier of the New York bank, was called as a witness in its behalf, and, after explaining the letters and telegrams which were sent by the banks, and the transactions which they detailed, testified that the dealings between the banks were such as take place between banks carrying on legitimate banking business, in the usual course of business, and that the notes were not discounted in any other way, and that the bank had no notice or intimation that the notes had not been regularly received by the First National Bank, or offered by it in the regular course of business, or for the benefit of any person other than the bank, or interested in the proceeds; and that the United States National Bank, in its correspondence and dealings, did not recognize H. G. Allis, W. C. Denney, or S. S. Smith personally or in any capacity than as representing the First National Bank; and that the transactions were solely with the First National Bank; and that the correspondence and transactions were usual for the president and cashier of a United States national bank to carry on; and that the proceeds of the various discounted notes were withdrawn by the Little Rock bank in the regular course of business by its officers.

There was a detailed statement of the transactions between the banks attached to Hopkins' deposition, which is not in the record, but instead thereof there appears the following:

“The account current here referred to began June 27, 1892, and continued until the suspension of business of the First National Bank. It shows almost daily entries of debit and credit. It shows that the several notes discounted by the United States National Bank, and referred to in the depositions of the officers of that bank, being forty-nine in number, were charged against the account of the First National Bank by the United States National Bank at the several dates of their ma-

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turity. In two-thirds of the instances where such charges were made the balance to the credit of the First National Bank on the books of the United States National Bank was sufficient to cover the charge. In other instances the balance to the credit of the First National Bank was insufficient to meet the charge at the time of the entry, and in the other instances the account of the First National Bank was in overdraft, as shown by the books of the United States National Bank at the time the charge was made.

"The account shows that at the time of the suspension of the First National Bank the latter bank had a credit of \$467.86 upon the books of the United States National Bank. Against this balance the notes in suit, with protest fees, were charged on the account April 17 and May 15, 1893, making the account show a balance in favor of the United States National Bank of \$24,558.03.

"This is the paper marked '77,' referred to in the depositions of Henry C. Hopkins, James H. Parker, Joseph W. Harriman, and John J. McAuliffe, hereto annexed."

The record also shows that "J. H. Parker, president, Joseph W. Harriman, second assistant cashier, and John J. McAuliffe, assistant cashier, each testified to identically the same facts in the identical language as Henry C. Hopkins, and it is agreed that the depositions of Hopkins shall be treated as the deposition of each of the said witnesses, without the necessity of copying the deposition of each witness."

There was proof made of the protest of the notes.

There was testimony on the part of the plaintiff showing that it was the custom of the banks at Little Rock to rediscount, through their presidents and cashiers, until after a decision in the National Bank Case of Cincinnati, in January, 1893. After that it was done by resolution of the board of directors, and the banks of New York and other commercial cities commonly require that now.

By a witness who was cashier of the Little Rock

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bank from November, 1890 to October, 1891, Allis then being president, it was shown that it was the custom of the bank, as to rediscounting notes, for the cashier or assistant cashier to refer them to the president, and the president generally directed what amount and where to send them. Whether they were referred to the board of directors, the witness was unable to say.

On cross-examination the witness testified that, when the discounts were determined on, the cashier or assistant cashier transacted the business. He, however, only remembered sending off one lot of discounts ; Mr. Denny, the assistant cashier, usually carrying on the correspondence. He did not remember that the president ever did anything of that kind. "Either Mr. Denney or I would say to him that something of the kind was needed, and he would direct the quantity and what correspondents usually to send to."

There were introduced in evidence "the reports or statements by the bank to the comptroller of the currency, showing the rediscount and business of the bank, of date May 17, 1892, and July 12, 1892, as follows : The report of May 17th was sworn to by W. C. Denney, cashier, and attested by James Joyce, E. J. Butler, and H. G. Allis, directors, and showed, 'Notes and bills rediscounted, \$16,132.40.' The report of July 12th was sworn to by H. G. Allis, president, and attested by Charles T. Abeles, E. J. Butler, and John W. Goodwin, directors, and showed, 'Notes and bills rediscounted, \$81,748.80.' "

The testimony on the part of the plaintiff in error showed (we quote from brief of defendant in error) that "the notes never belonged to the First National Bank ; that the three notes of the Electric Street-Railway Company were executed to Brown and Allis for accommodation of Allis, and the two notes of McCarthy & Joyce Company were executed and delivered to Allis for the purpose of raising money for the Company, to be placed to its credit with the First National Bank, to which McCarthy & Joyce Company was indebted ; that neither of the notes was ever passed upon by the

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discount board of the bank, or appeared on the books of the bank; that, after the bank was notified that the notes had been discounted and placed to its credit, Allis directed the proceeds of the notes (\$25,000) to be placed to his credit on the books of the bank, at which time there was an overdraft against him of \$10,679.44; that Allis was at that time indebted to the Little Rock bank on individual notes for at least \$50,000, and was continuously thereafter indebted to the bank until its failure."

As to the power of the president to direct rediscounts or to indorse the notes of the bank, E. J. Butler, N. Kupferle, and C. T. Abeles, who were directors of the bank at the time of the transactions between it and the New York bank, testified, respectively, as follows:

"Butler: Was a pretty regular attendant at the board meetings, during the year,—at nearly all the meetings.

"Q. Did Mr. Allis have authority to discount notes for the bank or to rediscount them?

"A. Never that I knew of. I knew that when Colonel Roots was president he asked and received authority from the board to make rediscounts, but I do not know that Mr. Allis ever asked, and the board, when I was present— He never was given any authority to make rediscounts for the bank.

"Q. Did he have authority from the bank to indorse its papers for rediscount?

"A. No, sir; never that I was aware of."

On cross-examination he testified that he did not recollect Allis asking for authority; that the question never came before the board as to discounts. He knew that there were discounts made, but did not recollect any particular ones, but in case there were he would suppose they were on the authority of the board, given in his absence, but did not remember that the question was brought up at all.

"Q. There are a couple of statements made by the bank (being the statements heretofore introduced by the plaintiff) of May 17, 1892, and July 12, 1892, to

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which you as a director certify, which show,—one of May 17 shows rediscounts, \$16,172.40, and the one of July 12, 1892, shows rediscounts, \$81,748.88. Did you sign these?

“A. I couldn’t say, without referring to the original reports.

“Q. These are the published reports, are they not?

“A. They purport to be the published report but I do not know anything about it. I was one of the directors at that time.

“Q. That is one of the usual forms of the reports published in the papers, isn’t it?

“A. Yes, sir.

“Q. You now tell the jury that you do not know anything about the extent of rediscounts made by it?

“A. No, sir ; I cannot remember.”

Mr. Denney was cashier in 1892, and he supposed that Denney transacted the business as to indorsements and rediscounting, but did not know and did not recollect that Allis did. Did not hear of him indorsing the notes in suit until after the bank failed.

“Kupferle : Mr. Allis did not have the power from the board of directors of the bank to indorse its paper for rediscount.”

Cross-examination : “There was nothing said in the board about such power. The question was not brought before the board. The bank during that time rediscounted paper. The cashier generally attended to that. I knew that the bank was discounting paper. I recall once where the president requested of the board that the bank should borrow some money. That was in the fall of 1892. I knew that the bank had been discounting paper long before that, and borrowing money before that, and no authority had been asked of the board to do it. I knew that they were borrowing money and rediscounting paper continually.”

Redirect : “We had eleven or thirteen members of the board of directors ; I forget which. Never less than eight or nine. There was seldom a meeting when all were present,—a majority present.

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"Q. Did they at any time rediscount or authorize the rediscounting of paper? Did they have that authority?

"A. No, sir; that was not their business.

"Q. Theirs was to discount paper for customers of the banks?

"A. The daily offerings; yes, sir."

Did not know of Mr. Allis indorsing the name of the bank upon the paper for the purpose of rediscounting it.

"Q. Did you, as a member of the board of directors, or otherwise, have any information that Mr. Allis was using the name of the bank upon his or other people's paper, for accommodation?

"A. No, sir; I never did."

Cross-examination:

"Q. You didn't know that he was using the name of the bank on the bank's paper?

"A. No, sir.

"Q. You knew he was discounting paper?

"A. No, sir; it was not his place.

"Q. Didn't the correspondence there show he was sending the paper for discount all over the country?

"A. No, sir; I don't know anything about that.

"Q. Wasn't it your business to know it?

"A. I do not know.

"Q. You was vice president and one of the directors?

"A. Yes, sir; I never knew anything about it until the failure of the bank,—that he ever used the bank's name."

"Abeles: Not while I was there [at the meetings of the board] was authority given to Allis, as president, to indorse or rediscount the notes of the bank. I do not think it was ever mentioned. I knew of the bank rediscounting paper, and somebody was transacting that part of the business. I think I inquired of some of the directors who it was, and was told that the authority vested in the cashier. I do not recollect that I inquired of Allis or Denney."

"Cohn: Was not a director in 1892,—was for ten

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years prior to that time,—and Allis was president in 1891, but did not recollect that he had authority from the board to indorse its paper or to rediscount it.”

Cross-examination: “Knew that rediscounting was being done, but supposed it was being done by the cashier,—didn’t stop to inquire.”

Redirect:

“Q. Who was authorized in the bank to perform that duty?

“A. I understood the cashier.”

Cross-examination:

“Q. How was he authorized?

“A. By law.

“Q. You are simply giving your legal opinion?

“A. Well, I understood that was his authority.”

Other facts are stated in the opinion of the court.

Upon filing the record, the defendant in error made a motion to dismiss, which was postponed for the consideration of the merits.

Sterling R. Cockrill, for plaintiff in error.

John Fletcher, for defendant in error.

MR. JUSTICE MCKENNA, after making the above statement, delivered the opinion of the court.

1. To sustain the motion to dismiss, it is contended that the jurisdiction of the case depends on the diversity of citizenship, and hence that the judgment of the circuit court of appeals is final. But one of the defendants (plaintiff in error), though a citizen of a different state from the plaintiff in the action (defendant in error), is also a receiver of a national bank appointed by the comptroller of the currency, and is an officer of the United States, and an action against him is one arising under the laws of the United States. *Kennedy v. Gibson*, 8 Wall. 498; *In re Chetwood*, 165 U. S. 443, 17 Sup. Ct. 385; *Sonnentheil v. Brewing Co.*, 172 U. S. 401, 19 Sup. Ct. 233. It is, however, urged that such appointment was not shown. It was not explicitly alleged,

National Bank—
Action against
Receiver—
Jurisdiction.

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but we think that it sufficiently appeared, and the motion to dismiss is denied.

2. Against the correctness of the action of the circuit court in instructing a verdict for the New York bank, it is urged that the discounting of the notes in controversy was for the personal benefit of Allis, and that the New York bank was charged with notice of it because of the nature of the transaction, the form of the notes, and the order of the indorsements, and also because notice was a question of fact to be decided by the jury on the evidence.

It is also contended that the receiver was entitled to a judgment on the set-off. We will examine each of the propositions.

1. The argument to sustain this is that the facts detailed constitute borrowing money, and that borrowing is out of the usual course of legitimate banking business; and one who loans must, at his peril, see that the officer or agent who offers to borrow for a bank has special authority to do so. But is borrowing out of the usual course of legitimate banking business?

Banking in much, if not in the greater part, of its practice, is in strict sense borrowing, and we may well hesitate to condemn it as illegitimate, or regard it as out of the course of regular business, and hence suspicious and questionable. "A bank," says Morse (Banks, § 2), "is an institution, usually incorporated with power to issue its promissory notes intended to circulate as money (known as bank notes); or to receive the money of others on general deposit, to form a joint fund that shall be used by the institution, for its own benefit, for one or more of the purposes of making temporary loans and discounts; of dealing in notes, foreign and domestic bills of exchange, coin, bullion, credits, and the remission of money; or with both these powers, and with the privileges, in addition to these basic powers, of receiving special deposits and making collections for the holders of negotiable paper, if the institution sees fit to engage in such business."

This defines the functions. What relations are

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created by them? Manifestly, those of debtor and creditor; the bank being as often the one as the other.

A "banker," Macleod says, is a trader who buys money, or money and debts, by creating other debts, which he does with his credit,—exchanging for a debt payable in the future one payable on demand. This, he says, is the essential definition of "banking." "The first business of a banker is not to lend money to others, but to collect money from others." 1 Macleod, Banking (2d Ed.) pp. 109, 110. And Gilbart defines a banker to be "a dealer in capital, or, more properly, a dealer in money. He is an intermediate party between the borrower and the lender. He borrows of one party and lends to another." 1 Gilb. Bank. p. 2.

The very first banking in England was pure borrowing. It consisted in receiving money, in exchange, for which promissory notes were given, payable to bearer on demand; and so essentially was this banking, as then understood, that the monopoly given to the Bank of England was secured by prohibiting any partnership of more than six persons "to borrow, owe, or take up any sum or sums of money on their bills or notes payable at demand." And it had effect until 1772 (about 30 years), when the monopoly was invaded by the introduction of the deposit system. The relations created are the same as those created by the issue of notes. In both a debt is created; the evidence only is different. In one case it is a credit on the banker's books; in the other, his written promise to pay. In the one case he discharges it by paying the orders (checks) of his creditor; in the other, by redeeming his promises. These are the only differences. There may be others of advantage and ultimate effect, but with them we are not concerned.

But it may be said these views are elementary, and do not help to a solution of the question presented by the record, which is not what relation a bank has, or what power its officers may be considered as having. In its transactions with the general public, but what is its relation, and what power its officers may be

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considered as having, in its transactions with other banks. Indeed, the question may be even narrower,—not one of power, but one of evidence. If so, the views expressed are pertinent. They show the basis of credit upon which banks rest, and the necessity of having power to support it; maybe to extend it. Borrowing is borrowing, no matter from whom. Discounting bills and notes may require rediscounting them; buying bills and notes may require selling them again. Money may not be equally distributed. It is a bank's function to correct the inequality. The very object of banking is to aid the operation of the laws of commerce by serving as a channel for carrying money from place to place, as the rise and fall of supply and demand require, and it may be done by rediscounting the bank's paper or by some other form of borrowing. *Curtis v. Leavitt*, 15 N. Y. 1; *First Nat. Bank v. National Exchange Bank*, 92 U. S. 122; *Cooper v. Curtis*, 30 Me. 488.

Banks—Rediscounting—Power to Borrow.

A power so useful cannot be said to be illegitimate, and declared as a matter of law to be out of the usual course of business, and to charge everybody connected with it with knowledge that it may be in excess of authority. It would seem, if doubtful at all, more like a question of fact, to be resolved in the particular case by the usage of the parties or the usage of communities.

It is claimed, however, that *Bank v. Armstrong*, 152 U. S. 346, 14 Sup. Ct. 572, establishes the contrary, and decides the proposition contended for by the plaintiff in error. We do not think it does. Some of its language may seem to do so, but it was used in suggestion of a question which might be raised on the facts of the case, without intending to authoritatively decide it. The facts of that case are different from the facts of the pending one, and in response to its citation we might rest on the difference. But plaintiff in error urges the case so earnestly and confidently that we have considered it better to answer the argu-

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ment on which it is asserted to be based, and remove misapprehension of the extent of the decision.

2. Did the form of the notes or the order of indorsements charge the New York bank with inquiry of Allis' authority or with knowledge of his use of them for his personal benefit?

Negotiable Notes—
Title of Holder—
Notice.

It may be conceded that an individual negotiating for the purchase of a bill or note from one having it in possession, and whose name is upon it, must assume that the title of the holder, as well as the liability of all prior parties, is precisely that indicated by the paper itself. These principles are established by *West St. Louis Sav. Bank v. Shawnee County Bank*, 95 U. S. 557; *Bank v. Hammitt*, 50 N. Y. 158; *New York Iron Mine v. Negaunee Bank*, 39 Mich. 644; *Lee v. Smith*, 84 Mo. 304; *Park Hotel Co. v. Fourth Nat. Bank*, 30 C. C. A. 409, 86 Fed. 742; *Claflin v. Bank*, 25 N. Y. 293.

But it is not meant that circumstances may not explain the notes or may not relieve the taker from the obligation of inquiry. If the order of indorsements and Allis' official position and his relation to the notes were circumstances to be considered, they were not necessarily controlling against all other circumstances, and compelled inquiry as a peremptory requirement of law.

3. In judging of the conduct and rights of the New York bank, the question is not what actual authority Allis had, but what appearance of authority he had, or, rather, what appearance of authority he was given or permitted by the directors.

Same—Implied
Authority of Pres-
ident to Redis-
count.

In the inquiry there are involved the two preceding propositions as questions of fact, or of mixed law and fact. The first,—the power of a bank to rediscount its paper,—as to what the course of dealing of the contending banks was; the second,—the form of the notes and their order of indorsements as notice,—whether

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relieved by the circumstances which attended them and the transactions which preceded them.

The evidence shows that it was not only the custom of the defendant bank to rediscount its paper, but that it was the custom of the other banks at Little Rock to do so, and the officers of the New York bank testified as follows :

"Q. Were there any of the dealings between said banks (the parties to this action) other than such as take place between banks carrying on a legitimate banking business, in the usual course of business ?

"A. No.

"Q. Were the correspondence and transactions carried on by H. G. Allis and W. C. Denney, as you have disclosed, such as are usual for the president and cashier of a United States national bank to carry on and exercise ?

"A. Yes."

This testimony certainly has very comprehensive scope, and there is no contradiction of it. It must be received, at least, as establishing that, as between the contending banks, rediscounting paper was in the usual course of their business, and that, besides, it was the usual course of business in their respective localities. Therefore the discounting of the notes in controversy carried the sanction of such business.

It is contended that the notes gave notice of the want of authority to rediscount them because the indorsement of the bank followed that of Allis, and hence showed that the bank was an accommodation indorser, and because the indorsement of the bank was by its president, and not by its cashier.

The order of indorsements did not necessarily import that the Little Rock bank was an accommodation indorser. The order was a natural one, if the notes had been discounted in the regular course of business. It is not contended that a want of power precluded the bank from discounting the notes of its officers. It had been done for one of the directors, and his note was rediscounted by the New York bank. It had an

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example, therefore, in the dealings of the parties, and, besides, was neither wrong nor unnatural of itself. But it was further relieved from question, and any challenge in the indorsements was satisfied by the circumstances. -

It is to be remembered that the discounting the notes in controversy was not the only transaction between the banks. It was one of many transactions of the same kind. They justified confidence, and it was confirmed by the manner in which the notes were presented. It is conceded that the cashier had the power to rediscount the bank's paper, and it was he who solicited the accommodation on account of which the notes were sent to the New York bank. The notes themselves, it is true, were sent by Allis, but expressly on the part of the bank, and subsequent correspondence about them was conducted with the cashier, as we have seen. And there could have been no misunderstanding. The letter of the New York bank which the cashier of the Little Rock bank answered was specific in the designation of the notes, their sum, and the proceeds of the discount, and returned one of the notes not in controversy to be corrected. To this the cashier replied :

“Dec. 20, 1892.

“United States National Bank, New York City—
Gentlemen : We have your favor of the 10th inst., inclosing the Dickenson Hardware Company note for completion, which we herewith return.

“We charge your account with \$31,871.27, proceeds of \$32,500.00 of discounts.

“Yours, very truly,

“W. C. Denney, Cashier.”

Notice was therefore brought to him and to the bank of the transaction, and almost inevitably of its items. Was he deceived as to the notes which had been sent? It is not shown nor is it suggested how such deception was possible, and a presumption of ignorance cannot be entertained. Therefore, if the discounts he wrote about in his letter of the 20th of December were not in

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pursuance of those he had requested in his letter of November 25th, he ought to have known and ought to have so said. If he had so said, the New York bank could have withdrawn the credit it had given, and Allis' wrong could not have been committed.

The strength of these circumstances cannot be resisted. Against them it would be extreme to say that the New York bank was put to further inquiry. Of whom would it have inquired? Not of Allis, the president of the Little Rock bank, because his authority would have been the subject of inquiry. Then necessarily of the cashier. But from the cashier it had already heard. He began the transaction. He acknowledged its close, accepting the credit which had been created for the bank of which he, according to the argument, was the executive officer. We can discover no negligence on the part of the New York bank. The dealing with the notes in controversy came to it with the sanction of prior dealings with other notes. It was conducted with the same officers. It was no more questionable. The relation of Allis to it, we have seen, was not unnatural, and, if the indorsement of other notes was not shown to be by him, it was not shown not to have been by him. The testimony of the officers of the New York bank was that the notes were received and discounted in the regular course of business, and in no way different from the other notes discounted by it for the Little Rock bank, and that they knew the notes were properly indorsed by one of the duly-authorized officers of the First National Bank; but, as the notes were not in their possession, they were unable to state the name of the officer. The testimony opposed to this, if it may be said to be opposed, is negative and of no value. Some of the directors testified that Allis did not have the power nor did they know of his having indorsed the bank's paper for rediscount. They knew, however, that the bank's paper was rediscounting in large amounts, and that money was borrowing continually, but they scarcely made an inquiry, and one of them testified

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that only in a single instance did Allis request the board for power to borrow money. The instance is not identified, except to say that it was in the fall of 1892. Of whom, in what amount, whether the request was granted or denied, what inquiry was made, what review of the business of the bank was made, there was absolute silence about. They surrendered the business absolutely to the president and cashier, and intrusted the manner of the execution to them. This court said by MR. JUSTICE HARLAN, in *Martin v. Webb*, 110 U. S., at page 15, 3 Sup. Ct., at page 433: "Directors cannot, in justice to those who deal with the bank, shut their eyes to what is going on around them. It is their duty to use ordinary diligence in ascertaining the condition of its business, and to exercise reasonable control and supervision of its officers. They have something more to do than from time to time to elect the officers of the bank and to make declaration of dividends. That which they ought, by proper diligence, to have known as to the general course of business in the bank, they may be presumed to have known in any contest between the corporation and those who are justified by the circumstances in dealing with its officers upon the basis of that course of business."

Under section 5136, Rev. St., it was competent for the directors to empower the president or cashier, or both, to indorse the paper of the bank, and, under the circumstances, the New York bank was justified in assuming that the dealings with it were authorized and executed as authorized. *Briggs v. Spaulding*, 141 U. S. 132, 11 Sup. Ct. 924; *People's Bank v. National Bank*, 101 U. S. 181; *Davenport v. Stone*, 104 Mich. 521, 62 N. W. 722; *Bank v. Stone*, 106 Mich. 367, 64 N. W. 487; *Houghton v. Bank*, 26 Wis. 663; *Thomas v. Bank*, 40 Neb. 501, 58 N. W. 943.

4. Set-off is the discharge or reduction of one demand by an opposite one. That of plaintiff in error was so applied, and the amount due on the notes reduced. He was entitled to no other relief.

Set-off.

Notes

Scott v. Armstrong, 146 U. S. 499, 13 Sup. Ct. 148, does not apply. In that case it was held that a debtor of an insolvent national bank could set off against his indebtedness to the bank, which became payable after the bank's suspension, a claim payable to him before the suspension. And it was further held that the set-off was equitable, and therefore not available in a common-law action.

But in this case the plaintiff in error pleaded the set-off. His right to do so was derived from the law of Arkansas, and that law provided: "If the amount set off be equal to the plaintiff's demand, the plaintiff shall recover nothing by his action; if it be less than the plaintiff's demand, he shall have judgment for the residue only." Gould, Dig. Ark. p. 1020, § 5. The law was complied with.

It follows that the circuit court did not err in instructing the jury to find for the plaintiff (defendant in error), and judgment is affirmed.

NOTES.

National Banks—Receivers—Jurisdiction.—Under the National Bank Act, if a sufficient fund is realized from the assets to pay all claims against the bank, and to leave a surplus, the comptroller ought to allow interest on the claims, during the period of administration, before appropriating the surplus to the shareholders of the bank. *Chemical Nat. Bank v. Bailey*, 12 Blatchf. (U. S.) 480, 1 Nat. Bank Cas. 260.

A receiver appointed to wind up a national bank is an officer of the United States, so as to bring an action brought by him within the jurisdiction of a federal court. *Platt v. Beach*, 2 Ben. (U. S.) 303, 1 Nat. Bank Cas. 182; *Staunton v. Wilkeson*, 8 Ben. (U. S.) 357, 2 Nat. Bank Cas. 162; *Frelinghuysen v. Baldwin*, 12 Fed. Rep. 395, 397, 398; *Price v. Abbott*, 17 Fed. Rep. 506; *Armstrong v. Ettleshon*, 56 Fed. Rep. 209; *Kennedy v. Gibson*, 8 Wall. (U. S.) 498, 1 Nat. Bank Cas. 17, 21.

Banks—Implied Power to Borrow Money.—The authority to borrow money is by implication included in a grant of general banking powers. *Magee v. Mokelumne Hill Canal, etc., Co.*, 5 Cal. 258; *Ringling v. Kohn*, 6 Mo. App. 333; *Donnell v. Lewis County Sav. Bank*, 80 Mo. 165; *Leggett v. New Jersey Mfg., etc., Co.*, 1 N. J. Eq. 541, 23 Am. Dec. 728; *Jackson v. Brown*, 5 Wend. (N. Y.) 590; *Barnes v. Ontario Bank*, 19 N. Y. 152; *Coats v. Donnell*, 94 N. Y. 168; *Ridgway v. Farmers' Bank*, 12 S. and R. (Pa.) 256, 14 Am. Dec.

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681; *Rockwell v. Elkhorn Bank* 13 Wis. 653; *Ballston Spa Bank v. Marine Bank*, 16 Wis. 120; *Australasia Bank v. Breillat*, 6 Moo. P. C. 152, 194.

"Borrowing money to lend again is a part of the legitimate business of banking. A banker is a dealer in capital, an immediate party between the borrower and lender. He borrows of one party and lends to another, and the difference between the terms at which he borrows and lends is the source and measure of his profits." *Per SHANKLAND, J.*, in *Curtis v. Leavett*, 15 N. Y. 166.

In the same case, *COMSTOCK, J.*, discussing the power of a bank to borrow money, said (15 N. Y.): "And this leads me to observe that banking, regarded as a business and not as a franchise, includes the borrowing of money as one of its features or incidents. As no one denies this proposition, I will not dwell upon it further than to quote the remarks of an eminent English judge, *MR. PEMBERTON LEIGH*, chancellor of the Duchy of Cornwall, in a late case in the Privy Council. *Australasia Bank v. Breillat*, 6 Moo. P. C. 152. He observed: 'The nature of a banker's business, especially if the bank be one both of issue and deposit, necessarily exposes him to sudden and immediate demands which may be to the extent of a large portion of his debts, while his profits are to be made in employing his own moneys and those intrusted to him in discounting bills, in loans, and other modes of investment. It is impossible that he should always have his assets in such a state as to be applicable immediately to the payment of all demands that may be made upon him. * * * We have no doubt at all, therefore, that in ordinary banking partnerships such power exists, and that the directors, by the terms of their appointment, have all the general powers, and among the rest, the power of borrowing, unless such power is excluded by other provisions of the deed.'"

The power to accept deposits necessarily implies the power to receive money as a loan, and to assign or mortgage negotiable instruments. *Ward v. Johnson*, 95 Ill. 215.

In *Planters' Bank v. Sharp*, 6 How. (U. S.) 301, the court said, on page 323: "The chief business and design of most banks, their very vitality, is to incur debts as well as have credits. All their deposit certificates or bank book credits to individuals are debts of the bank, and which it is a legitimate and appropriate part of its business as a bank to incur and to pay. The same may be said also of all its banknotes, or bills, they being merely promises or debts of the bank, payable to their holders, and imperative on them to discharge." *Citing Columbia Bank v. Patterson*, 7 Cranch (U. S.) 307; *Augusta Bank v. Earle*, 13 Pet. (U. S.) 593.

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UNION NAT. BANK OF KANSAS CITY *et al.*

v.

HILL *et al.*

(*Supreme Court of Missouri, Feb. 21, 1899.*)

Savings Banks—Insolvency—Negligence of Directors.—The defendant directors of an incorporated savings bank, before its insolvency, failed to discover that many loans were being made by the bank in violation of an express statutory provision, and to insolvent persons, and they left the entire management of its business to the cashier. Many of the sums of money so loaned having been lost by reason of the insolvency of the debtors, the bank became insolvent and made an assignment. *Held*, that such insolvency was the result of failure on the part of the directors to exercise ordinary care in the discharge of their duties.

Same—Same—Liability of Directors to Creditors.*—For the mere failure of such directors to exercise ordinary diligence and care, as such in the management of the business affairs of the bank, by reason of which the bank became insolvent, they could not be held responsible at the suit of the bank's general creditors.

APPEAL by plaintiffs from Saline county circuit court. *Affirmed.*

Leslie Orcar, A. F. Rector, F. M. Black, Nathan Frank, C. W. Bates, John W. Beebe, I. N. Watson, and D. V. & E. S. Herider, for appellants.

Thos. W. Shackelford, Davis & Duggins, John A. Rich, S. B. Burks, W. M. Williams, and Johnson & Lucas, for respondents.

BURGESS, J. On the 17th day of October, 1894, the Citizens' Stock Bank of Slater, Mo., having become insolvent, made an assignment to defendant Com. P. Storts, for the benefit of its creditors, and the plaintiffs, whose demands were allowed by the assignee, prosecute this suit against the bank, the assignee, and the administrator of the estate of Joseph Field, deceased, who was cashier, and against

Case Stated.

*See notes at end of case.

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Field's estate, and the other defendants, directors, upon the alleged ground that the insolvency of the bank was brought about by their neglect and mismanagement. After a demand upon, and a refusal by, the assignee to institute suit, this suit was brought by plaintiffs. There was judgment for defendants in the trial court, and the case is here on plaintiffs' appeal for review.

The Citizens' Stock Bank was organized under the laws of this state on the 1st day of September, 1882, with a capital stock of \$30,000. On the 7th day of November, 1887, the capital stock was increased to \$100,000, and the bank made an assignment on December 17, 1894, for the benefit of its creditors. The petition charges the defendants with negligence in failing to take any part in the management of the affairs of the bank; in turning the management of the business thereof over to Joseph Field, the cashier, during the existence of the bank; in making loans to various persons and firms when they were insolvent; and in making to each of certain named persons, firms, and corporations loans in excess of 25 per cent. of the capital stock of the bank,—by reason of all which said sums of money so loaned were lost, and said bank became insolvent. The plaintiffs sue for themselves and all other persons similarly situated. The total amount of the assets which came into the hands of the assignee, including real estate, furniture, cash and cash items, sums due from other banks, overdrafts, notes less credits, 50 shares of stock in the St. Louis National Bank (which was held by the Chemical Bank of St. Louis as collateral security and was worth \$5,000), and notes held by other banks and persons as collateral security, at face value, amounted to \$673,339.22. There were also other notes held as collateral by other banks which were not included in the inventory. The claims allowed by the assignee amount to \$554,592.32, aside from \$10,000 or \$12,000 of other unadjusted demands. The assignee, after diligent effort to collect the money due the bank up to the time of the trial, had only been able to collect some \$45,000, or \$46,000, not including

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some \$18,000 adjusted by way of off-sets, and had paid a dividend of 3 per cent. only. His evidence was to the effect that a very large portion of the notes which came into his possession are worthless, because of the insolvency of the persons liable thereon, and that most of the notes held by other banks and individuals are of no value for the like reason. On the 7th day of November, 1887, the defendant directors increased the stock of the bank from \$30,000, to \$100,000, and in doing so caused an alleged surplus of \$30,000 to be applied in payment of new stock issued to the existing stockholders, when in fact there were no surplus earnings on hand. At the time the capital stock of the bank was increased the Mead Mercantile Company was indebted to the bank on notes \$42,155, and overdraft \$2,261.21, making in all \$44,420.21, which was more than the entire capital stock before the increase, and more than 25 per cent. after the increase. The indebtedness of this company continued to be greatly in excess of 25 per cent. of the capital stock of the bank up to the date of the assignment, when it amounted to \$84,825.98. Only a small portion of this indebtedness was ever secured. At the time the capital stock of the bank was increased, the firm of Storts & Eubanks owed the bank \$37,380.-99, which was more than its capital stock before the increase, and more than 25 per cent. after the increase. This indebtedness continued to increase up to June, 1892, when it amounted to \$117,294 more than the amount of the capital stock. This firm failed in business on the last-named date. For this money the bank never had any security. The members of the firm are the sons of two of the directors of the bank. In addition to the amount owing by this firm, one of its members, W. B. Storts, at the time of the assignment by the bank, owed it on his personal account the sum of \$53,103.52, for borrowed money, from time to time for the last two years next preceding the assignment, for which the bank had no security, and the loss a total one. The indebtedness of one Joseph Baker to the bank in June, 1892, exceeded 25 per cent. of its capital

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stock, and so continued up to the time of the assignments when it amounted to \$67,709.41. For this indebtedness, the bank never had any security. In addition to the above, we have the indebtedness of the firm of B. P. Storts & Co., of which firm Joseph Field, the bank's cashier, was a member, and of Joseph Field, amounting to \$67,979, and a loss of not less than \$40,000 to \$50,000. While the books of the bank show that the notes of these parties were discounted, and the proceeds placed to their respective credits, there is nothing on the books, in many instances, to show when and for what time the discounted notes were renewed. It is the same with respect to many other notes held by other banks as collateral security. Of the \$629,000 and over of notes shown by the inventory to be in the hands of the assignee, and in the hands of other banks and other persons as collateral security, \$307,355.38 do not appear to have gone through the bank,—that is to say, they do not appear upon the books of the bank; and \$286,055.85 in notes which were discounted, and do not appear by the books to have been paid, are not found in the inventory, either as in the possession of the assignee or in possession of other banks as collateral security. It is probable that in the \$307,355.38 there are renewal notes to the amount of \$286,055.85. It may be stated that the bank kept no separate account of bills payable. It seems to have been the custom of Field, the cashier, in borrowing money from other banks, to make a note signed by him as cashier, and secure the same by notes held by his bank, but the books of his bank contain no record of the notes turned over as collateral security. The information as to notes held by other banks comes from the correspondence turned over to the assignee.

On September 1, 1882, the incorporators of the bank met and adopted the following by-laws: "(1) The officers of this bank shall be a president, vice president, a secretary, a cashier, and an assistant cashier. The offices of secretary and cashier may both be filled by the same person. (2) The board of directors shall

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appoint such clerks as they may think necessary, regulate the salaries of all officers and clerks, determine the amount of dividend to be paid, the time and number of payments of dividends, and guard the interests of the bank. (3) The cashier shall be general manager of the business of the bank, and have supervision over it in all of its details. He shall have full power and authority to create indebtedness against the bank; to sign all issues of indebtedness and make indorsements for the bank, and receive and receipt for, and pay out, money for the bank; to appoint clerks, subject to the confirmation of the board, and prescribe their duties." Joseph Field was elected cashier of the bank at the time of its organization, and continued in that capacity to the time of the assignment. The directors met about once a year, but, having implicit confidence in the integrity and business capacity of the cashier, they paid no attention whatever to the business of the bank, but left it entirely to him. Several of them had large deposits in it at the time it closed its doors. The defendant Com. P. Storts, assignee, is a son of the defendant Perry C. Storts, and was clerk in the bank prior to, and at the time of, the assignment. There were other losses sustained by the bank which it is not thought necessary to set forth specifically, as those already stated are sufficient to a decision of the case.

The board of directors of a bank have a general superintendence over, and the management of, all its business affairs and transactions which ordinarily vest with it; and it has been said "that they are bound to know all that is done, beyond the merest matter of daily routine, and that they are bound to know the system and rules arranged for its doing." Morse, Banks, § 116. And what they ought to know as to the general course of the bank's business they will be presumed to have known in a contest between the bank and third persons dealing in good faith with it. They must also use ordinary care and diligence to know the conduct of their subordinate officers, as well as what

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the bank books show, and carefully observe the law under which the bank is organized. The duties of the defendant directors being thus outlined, the questions are: Did they fail to exercise ordinary care in the discharge of their duties, by reason of which the bank became insolvent? and, if so, can the plaintiffs, who are only creditors, maintain this action? Of these in their order.

Section 2758, Rev. St. 1889, provides that "no corporation organized under this article, or heretofore organized under a general or special law of this state, shall loan its money to any individual, corporation or company, directly or indirectly, or permit any individual, corporation or company to become at any time indebted to it in a sum exceeding twenty-five per cent. of its capital stock actually paid in, or permit a line of loans to any greater amount to any individual or corporation." The bank not only loaned moneys to the Mead Mercantile Company, Storts & Eubanks, Josiah Baker, and B. P. Storts & Co. in excess of 25 per cent. of its capital stock, thereby violating the statute, but it made many of these loans without security, when the parties were insolvent, when, by the exercise of ordinary care,—that is, such care and diligence as a prudent man exercises in the conduct of his own affairs in view of all the surrounding circumstances,—the board of directors might have known, as it was their duty to know, that the loans were in excess of the limit prescribed by statute, as well, also, as of the insolvency of the parties borrowing. *Thomp. Corp.* §§ 4104, 4108; *Spering's Appeal*, 71 Pa. St. 11; *Briggs v. Spaulding*, 141 U. S. 132, 33 Am. & Eng. Corp. Cas. 420, 11 Sup. Ct. 924. In *Martin v. Webb*, 110 U. S. 7, 3 Sup. Ct. 428, in speaking of the duties of the directors of a bank, it is said: "Directors cannot, in justice to those who deal with the bank, shut their eyes to what is going on around them. It is their duty to use ordinary diligence in ascertaining the condition of its business, and to exercise reasonable control and supervision of its officers. They have something more

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to do than, from time to time, to elect the officers of the bank, and to make declarations of dividends. That which they might, by proper diligence, have known as to the general course of business in the bank, they may be presumed to have known in any contest between the corporation and those who are justified, by the circumstances, in dealing with its officers upon the basis of that course of business." In the case of *Marshall v. Bank of Alexander*, 85 Va. 676, 8 S. E. 586, it was held that bank directors hold to stockholders, depositors, and creditors the relation of trustees to *cestuis que trustent*, and, as such, are personally responsible for frauds and loans resulting from negligence and inattention to their duties, even though they be not guilty of bad faith and are ignorant of the affairs of the bank. The same rule is announced in *Bank v. Caperton*, 87 Ky. 306, 8 S. W. 885; *Williams v. McKay*, 40 N. J. Eq. 190; 11 Am. & Eng. Corp. Cas. 613; *Delano v. Case*, 121 Ill. 247, 12 N. E. 676; *Seale v. Baker*, 70 Tex. 283, 7 S. W. 742. *Hun v. Cary*, 82 N. Y. 71, was a suit brought by the receiver of a savings bank against directors to recover damages because of misconduct in the management of the affairs of the bank, and EARL, J., in speaking of the duties which the directors owed to the bank and to its depositors, said: "Few persons would be willing to deposit money in savings banks, or to take stock in corporations, with the understanding that the trustees or directors were bound only to exercise slight care, such as inattentive persons would give to their own business, in the management of the large and important interests committed to their hands. When one deposits money in a savings bank, or takes stock in a corporation, thus divesting himself of the immediate control of his property, he expects, and has the right to expect, that the trustees or directors, who are chosen to take his place in the management and control of his property, will exercise ordinary care and prudence in the trusts committed to them; the same degree of care and prudence that men prompted by self-interest generally

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exercise in their own affairs. When one voluntarily takes the position of trustee or director of a corporation, good faith, exact justice, and public policy unite in requiring of him such degree of care and prudence, and it is a gross breach of duty—*crassa negligentia*—not to bestow them."

It would therefore seem that the defendant directors were remiss in the discharge of their duties in not knowing, when it was their duty to know, that loans were being made by the bank in violation of the statute, and to persons in amounts larger than its capital. Indeed, the case made out by plaintiffs is one of the most absolute and unqualified inattention and neglect by the directors. And while it is not pretended that they misappropriated any of the funds of the bank, or that they were guilty of any fraudulent conduct, they were guilty of gross neglect in leaving the entire management of the business of the bank to the cashier; and it is no excuse for the want of diligence to say that they had no benefit from it, and that their services were gratuitous, when, by the exercise of ordinary care, they could have prevented the disastrous consequences which flowed from the want of such care.

The defendant bank was doing business under article 7, § 3, c. 42, Rev. St. 1889, and by section 2748 of the Statutes, which is to be found in that article, it is provided that the affairs and business of such corporations shall be managed by a board of directors or managers; thus imposing upon them functions which are inalienable, and which they could not confer upon any officer or officers.

"Thus, the making of discounts is an inalienable function of the directors. They cannot part with it, or invest any officer or officers with it. It rests in them alone and exclusively. It is a power of that degree of vital importance that it cannot be taken out of the policy of the general principle that powers of a public nature, given by the legislature, cannot be subdelegated. The legislature imposes upon the board the duty of

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taking charge of all those matters of business upon the wise and skillful conduct of which the prosperity of the institution and the safety of persons dealing with it depend. This duty they cannot shift, in whole or in part, upon others, and it covers no department of banking business more unquestionably than the making of loans and discounts." *Morse, Banks*, § 117; *Gibbons v. Anderson*, 80 Fed. 345; 3 *Thomp. Corp.* §§ 4108, 4109; 1 *Mor. Corp.* §§ 552, 556; *Spering's Appeal*, 71 Pa. St. 11.

The directors having been guilty of negligence in the discharge of their duties by reason of which losses were sustained by the bank, they were liable in an action at law to the corporation, while a going concern, for such losses, or to the assignee after the assignment, or in equity to the stockholders, in the event of the declination of the assignee to bring suit. *Thompson v. Greeley*, 107 Mo. 577, 17 S. W. 962, was an action by the receiver of an insolvent savings bank against its directors, for losses sustained by the bank by reason of its having loaned its moneys in violation of the statute, and it was held that the directors were liable, at the suit of the corporation, for the losses to the corporate assets thereby sustained; citing *Bent v. Priest*, 86 Mo. 482; *Slattery v. Transportation Co.*, 91 Mo. 217, 4 S. W. 79; *Ward v. Davidson*, 89 Mo. 445, 1 S. W. 846; *Hodges v. Screw Co.*, 1 R. I. 312; *Smith v. Hurd*, 12 Metc. (Mass.) 371; *Attorney General v. Insurance Co.*, 2 Johns. Ch. 371; *Thomp. Liab. Off.* 376; *Cogswell v. Bull*, 39 Cal. 320; *Insurance Co. v. Jenkins*, 3 Wend. 130; *Hun v. Cary*, 82 N. Y. 70; *Mining Co. v. Ryan*, 42 Minn. 198, 44 N. W. 56. It was said in that case that a receiver of an insolvent corporation succeeds to the title of the property and rights of action of the corporation, when so invested by statute, or by the degree of the court appointing him, and is the proper party to a suit to enforce them by legal proceedings. If a right of action against these directors existed in favor of the corporation, this action is properly prosecuted in the name of the receiver. *Alexander v. Relfe*, 74

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Mo. 516; Gill v. Baliss, 72 Mo. 429; High Rec. § 316; Thomp. Liab. Off. 377, and authorities cited; Morse, Banks, § 129; Hun v. Cary, *supra*. If, then, an action can be maintained by a receiver of an insolvent bank against its directors for losses sustained by the bank because of their failure to exercise ordinary care and diligence in the management of the business of the bank, for like reason an assignee may do so, because, by reason of the assignment, he succeeds to all interests and assets of the bank. So, it has been held that, if the assignee refuse to sue, the stockholders, who are the real parties in interest, may maintain an action in their own names, making the corporation a defendant. Brinckerhoff v. Bostwick, 88 N. Y. 52; Greaves v. Gouge, 69 N. Y. 154; Seale v. Baker, 70 Tex. 283, 7 S. W. 742; Bank v. Caperton, 87 Ky. 306, 8 S. W. 885. And shareholders and creditors will be permitted to sue in similar circumstances. Wallace v. Bank, 89 Tenn. 630, 33 Am. & Eng. Corp. Cas. 253, 15 S. W. 448; Marshall v. Bank, 85 Va. 676, 8 S. E. 586; Halsey v. Ackerman, 38 N. J. Eq. 508, 1 Am. & Eng. Corp. Cas. 613; Ackerman v. Halsey, 37 N. J. Eq. 356. In each of these cases, the person or persons suing were either stockholders, or stockholders and creditors, and the fact that they were stockholders was chiefly relied upon for a recovery, so that they are not authority for the contention that persons who are creditors only may maintain such an action against the directors of an insolvent bank. Warner v. Hopkins, 111 Pa. St. 328, 2 Atl. 83, was an action by the creditors of an insolvent bank against its directors and assignee to charge the directors for losses sustained by the bank by reason of their mismanagement to such an extent as to render it insolvent, and it was held that the action might be maintained. The court said: "Had the creditors the right to file a bill? Of this we entertain no doubt. It was held in Watt's Appeal, 78 Pa. St. 370, that the shareholders are entitled to proceed by bill against the directors of a corporation for

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mismanagement of its affairs; citing Spering's Appeal, 71 Pa. St. 24, and Gravenstine's Appeal, 49 Pa. St. 310. It is settled by numerous cases that the creditors have the same right." So, in Trustees v. Bosseix, 3 Fed. 817, it was held that the directors of an insolvent corporation might be sued, by one or more of its creditors for losses sustained by the bank by reason of their negligence. In Foster v. Bank, 88 Fed. 604, plaintiffs, who were depositors in the bank of Abington, sued the bank and its directors, for themselves and all other creditors who might come in and be made parties plaintiffs, for losses sustained by the bank, by reason of their negligence, so as to render it insolvent; and, upon demurrer to the petition, it was held that the general relation of the bank to a depositor is that of debtor and creditor (citing City of St. Louis v. Johnson, 5 Dill. 241, Fed. Cas. No. 12,235), and that plaintiffs might maintain the action. Delano v. Case, 121 Ill. 247, 12 N. E. 676, was a suit by a general depositor in a bank against its directors for negligence in permitting it to be held out to the public as solvent when, in fact, it was at the time insolvent, by reason of which he sustained damages, and it was held that he might prosecute the action. See, also, 3 Thomp. Corp. § 4123; Maisch v. Saving Fund, 5 Phila. 30. These decisions all seem to proceed upon the theory that the directors of a banking corporation and its creditors occupy towards each other the relation of trustee and *cestui que trust*, but we are not prepared to adopt this view. "They are not express trustees: they are agents. They are trustees in the sense that every agent is a trustee for his principal, and bound to exercise diligence and good faith." Wallace v. Bank, 89 Tenn. 630, 3 Am. & Eng. Corp. Cas. 390, 15 S. W. 448. The relation of the creditors towards the corporation "is that of contract, and not of trust." Briggs v. Spaulding, 141 U. S. 132, 33 Am. & Eng. Corp. Cas. 4, 11 Sup. Ct. 924. In Deadrick v. Bank (Tenn. Sup.) 45 S. W. 786, it is held that directors of a corporation are its agents, and the agents of its stockholders, but owe no

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duty to corporate creditors, and are not liable to such creditors, after insolvency of the corporation, for loss made possible by their neglect to properly supervise the management of its affairs. The court said: "That directors are liable in an action at law to their principal, the corporation, for losses resulting to it from their malfeasance, misfeasance, or their failure or neglect to discharge the duties imposed by their office, and, in equity, to the stockholders for these losses, the corporation declining to bring suit, is clear, upon the authorities. Though the corporation is the legal entity, yet the stockholders are interested in the operations of the corporation while in a state of activity, and, upon its dissolution, in the distribution of its property, after all debts are paid; and so its officers or agents stand in a fiduciary relation to both. But it is otherwise as to creditors. The directors of a going corporation, whether able to pay its debts or not, owe no allegiance to them. It is true that the creditors may extend credit upon the faith that the company has assets to pay its debts, and that these assets are prudently managed; yet they are strangers to the directors: they maintain no fiduciary relation with them; there is a lack of privity between the two. As was said by the supreme court of the United States in *Briggs v. Spaulding*, 141 U. S. 132, 33 Am. & Eng. Corp. Cas., 420, 11 Sup. Ct. 924, the relation between the creditors and the corporation 'is that of contract, and not of trust': but there is nothing, of either contract or trust, in all ordinary cases, to create any relation between the creditor and the directors. A creditor of a going corporation being thus a mere stranger, we think it clear that he can no more, after the suspension of the corporation by insolvency, either in law or equity, set in motion litigation to hold its directors liable for losses attributable merely to inattention, than could the creditor of any other insolvent debtor maintain a suit against his agent under similar circumstances. In such a case as the one we are dealing with,—that is, loss to the corporation resulting from mere negligence

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on the part of its directors,—a creditor seeking to hold the directors liable for this loss, even in a suit like this, must rest his claim upon some provision of positive law.” *Landis v. Hotel Co.*, 53 N. J. Eq. 654, 1 Am. & Eng. Corp. Cas., N. S., 208, 33 Atl. 964, was a proceeding in equity by plaintiff, who was both a stockholder and a creditor of an insolvent corporation, to charge its directors with losses sustained by their mismanagement. The court reviewed the cases of *Halsey v. Ackerman* and *Williams v. McKay*, *supra*, and held that, in so far as the plaintiff was a stockholder, they were liable to him for losses resulting from their negligence, because of the fiduciary relations existing between them; but, as for losses sustained by him as a mere creditor, they were not liable to him for such negligence, because they did not occupy the relation to him as such creditor, and there was no evidence of diversion by them of the bank funds from their legitimate channel. In *Manufacturing Co. v. Foster* (Iowa) 41 N. W. 212, it was held that “the fact that directors of a corporation have mismanaged its business does not render them liable to creditors, unless they are made liable by the provisions of the articles of incorporation or by statute.” 3 *Thomp. Corp.* 4137. So, in *Fusz v. Spaunhorst*, 67 Mo. 266, it is held that, in the absence of statutory or constitutional provisions, a director or officer of an insolvent incorporated bank is not individually responsible in an action at law for injury resulting to a creditor or depositor from the management of the bank, unless the injury be occasioned by his intentional or fraudulent act. Our conclusion is that the relation of defendant bank to plaintiffs is that of debtor and creditor, and that for the mere failure of the bank directors to exercise ordinary diligence and care as such, in the management of the business affairs of the bank, by reason of which the bank became insolvent, they cannot be held responsible at the suit of its general creditors. We accordingly affirm the judgment.

GANTT, P. J., and SHERWOOD, J., concur.

Same—Same—
Liability of Directors
to Creditors.

Note

Action by Creditors against Directors.—Aside from statutory provisions or one of similar nature in the organic law, the directors or officers of a corporation would not be individually responsible in an action at law for injury resulting to a creditor unless the injury were occasioned by the malicious or fraudulent act of the party complained of. Mere nonfeasance will not answer; nothing short of active participancy in a positively wrongful act intendedly and directly operating injuriously to the party complaining will give origin to individual liability as above indicated. *Fusz v. Spaunhorst*, 67 Mo. 264; *Solomon v. Richardson*, 30 Conn. 360; *Harman v. Tappenden*, 1 East 555; *Vose v. Grant*, 15 Mass. 505; *Gerhard v. Bates*, 20 Eng. L. & Eq. 129; *Crown v. Brainerd*, 57 Vt. 625. See *Union Nat. Bank v. Douglass*, 1 McCrary (U. S.) 86.

The directors of a corporation appointed a secretary, whose character was free from suspicion, and to whom the funds of the corporation were not unnecessarily exposed, and they exercised reasonable care in relation to the performance of his duties. *Held*, that such directors were not personally liable to the stockholders for a loss by the fraud and embezzlement of the secretary, who had baffled inquiry by the production of false and forged books. *Scott v. Depeyster*, 1 Edw. Ch. (N. Y.) 513.

Payments made by a corporation, intending in good faith to go on and develop valuable patents owned by it, to its directors, of money borrowed from them in the ordinary course of business, are not recoverable from such directors by a creditor of the corporation whose debt at the time was not due and payable. *Holt v. Bennett*, 146 Mass. 437.

A creditor at large cannot, under §§ 1781, 1782, of *New York Code*, maintain an action against directors of a corporation for their misconduct. A judgment creditor only is entitled to sue. *Paulsen v. Van Steenberg*, 65 How. Pr. (N. Y.) 342.

Creditors of an insolvent corporation are, however, entitled in equity to have the company's remaining assets applied in payment of their claims, and this equitable right will be protected by the courts. *Branch v. Roberts*, 50 Barb. (N. Y.) 435; *Winter v. Baker*, 34 How. Pr. (N. Y.) 183; 50 Barb. (N. Y.) 432; *Fusz v. Spaunhorst*, 67 Mo. 264; *Zinn v. Mendel*, 9 W. Va. 580; *Crown v. Brainerd*, 57 Vt. 625; *Sweeny v. Sngar Refining Co.*, 30 W. Va. 443; *Atlanta Real Estate Co. v. Atlanta Nat. Bank*, 75 Ga. 41.

So a misapplication of the company's assets, either by the board of directors or by other persons, may be enjoined by the creditors of the insolvent corporation, and they may hold the company's agents liable for wasting assets which are needed to settle their claims on the ground that this constitutes a misapplication of the trust funds. *Gratz v. Redd*, 4 B. Mon. (Ky.) 178; *Bank of St. Mary's v. St. John*, 25 Ala. 566; *Wood v. Drummer*, 3 Mason (U. S.) 308; *Adder v. Milwaukee Brick Co.*, 13 Wis. 62; *Atlanta Real Estate Co. v. Atlanta Nat. Bank*, 75 Ga. 40; *McCarty's Appeal*, 110 Pa. St. 374; *People v. Bruff*, 60 How. Pr. (N. Y.) 1; *Sears v. Hotchkiss*, 25 Conn. 171.

An able discussion of this question will be found in *Landis v. Sea Isle City Hotel Co. et al.* (N. J. Ch.), 1 Am. & Eng. Corp. Cas., N. S., 208, 53 N. J. Eq. 654, in which case the authorities are reviewed.

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MOSHER *et al.**(Supreme Court of Nebraska, Feb. 23, 1899.)*

Jurisdiction—Effect of Federal Decision.—Where a cause has been removed from a state court to the federal court, and has been by that court remanded to the state court for want of jurisdiction, it is the duty of the state court, in subsequent proceedings, to treat as conclusive upon it the decision of the federal court on the question of jurisdiction.

Stockholders — Examinations of Books.—Assuming it to be the right of a stockholder in a corporation to examine the books thereof, it is not, as a matter of law, his duty to do so, after becoming a stockholder, for the purpose of ascertaining whether or not he has been defrauded in the purchase of such stock; he not being aware of any fact leading to a suspicion that he may have been so defrauded.

National Banks—Reports.—The object of requiring publication by national banks of reports made to the comptroller of the currency, in pursuance of section 5211, Rev. St. U. S., is to afford information to all persons having or contemplating business transactions into which the condition of the bank directly enters as a material factor.

Same—Same.—Therefore one contemplating the purchase of stock in the bank is entitled to rely on such publications equally with a depositor or note holder.

Reports—Attestation.—The statute referred to requires such report to be verified by the oath or affirmation of the president or cashier, and to be attested by the signature of at least three directors. To charge a director individually with the consequences of false reports, it must appear that he attested them, or that he in some manner participated in making or publishing them. The attestation is not the act of the whole board, but that of the individual directors signing it.

Same—False Representations.—One who makes a false representation, under circumstances which would render him liable if it were made voluntarily, is not excused by the fact that the law required him to make a true statement of the character counted upon.

Same—Knowledge of Officers.—The president and cashier of a bank, shown to have personally conducted its business, cannot be presumed ignorant of the falsity of reports of the bank's condition, by them published, the books of the bank on their face disclosing their falsity.

Same—"Attest"—Definition of.—The word "attest", as used in section 5211, Rev. St. U. S., means something more than to witness the execution of the report by the president or cashier; it means to certify its correctness.

Same—Attestation—Liability of Directors.—Where the directors of a national bank attest the reports made of its condition by its exec-

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ative officers to the comptroller of the currency, under section 5211, Rev. St. U. S., they thereby certify that the statements contained in said report are absolutely true. IRVINE and RYAN, CC., dissenting.

Same—Same—Same—Pleading and Proof.—In an action for false representations, it is not necessary to aver or prove that the party making them knew they were untrue; and this rule is applicable to an action for deceit against the director of a bank for falsely stating the financial condition of the corporation. IRVINE and RYAN, CC., dissenting.

Same—Same—Same.*—The directors of an insolvent national bank are personally liable, at the suit of one purchasing the stock of such bank, for damages sustained by the reason of the insolvency of the corporation, when the plaintiff is induced to make such purchase by false representations of solvency, contained in reports made by the bank to the comptroller of the currency, and attested by the directors, and published in pursuance of law, even though the directors were unaware that such reports and representations were false or untrue, and were made without intention to defraud. IRVINE and RYAN, CC., dissenting.

(Syllabus by the Court.)

ERROR by plaintiff to Lancaster county district court.
Reversed in part.

Webster, Rose & Fisher *dick*, for plaintiff in error.

Chas. O. Whedon, J. W. Dewese, and F. M. Hall, for defendants in error.

IRVINE, C. Henry Gerner brought his case against Charles W. Mosher, Richard C. Outcalt, Charles E. Yates, David E. Thompson, Rolla O. Phillips, Ambrose P. S. Stuart, and Ellis P. Hamer. *Homar*

Case Stated.

J. Walsh and Emma H. Holmes, the latter as administratrix of the estate of William W. Holmes, were also named as parties defendant, but as to them the proceedings seem to have been abandoned. The petition alleges that Mosher was the president of the Capital National Bank, Walsh its vice president, and Outcalt its cashier, and that the other defendants named, together with Mosher, constituted its board of directors. The petition is in two counts. The first alleges that on May 18, 1887, a report was made by the defendants to the comptroller of the currency of the resources and liabilities of said bank as they existed May 13, 1887:

*See note at end of case.

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that said report was sworn to by Outcalt, as cashier, and attested as correct by Mosher, Holmes, and Yates, as directors; that the defendants caused said report to be published in the State Journal, a newspaper published in Lincoln, "for the purpose of inducing others, and particularly this plaintiff, to deal with said corporation, and to repose in it and them, its directors and managing officers, and to induce others, and particularly this plaintiff, to purchase its capital stock, and make investments therein, and represented and held out said statement to be a true statement of the financial condition of said corporation." The report is then set out in terms, and it is alleged that said report was false, in that it overstated the mortgages, stocks and bonds held by the bank to the amount of \$30,000, the amount due the bank from reserve agents about \$76,000, and its loans and discounts about \$50,000; that said report and false representations were made by said four defendants with the knowledge, assent, and co-operation of all the other defendants, and the same were, as they and each of them well knew, wholly false and untrue; that plaintiff believed said representations to be true, and on the faith thereof purchased from Charles Hammond, on the 11th of July, 1887, 50 shares of the capital stock of said corporation, for the sum of \$6,250; that it would have been worth said sum had the said report been correct, but in fact the bank was insolvent and the stock worthless; that January 22, 1893, the bank failed; that the stockholders have been assessed 100 cents on the dollar on their stock, and judgment rendered against the plaintiff for said assessment; that, notwithstanding the bank had no net earnings, dividends were from time to time declared, and suit has been brought against the plaintiff to recover dividends by him received. The second cause of action is, substantially, pleaded in the same manner, charging a false report of the condition of the bank, September 30, 1889, and the purchase by the plaintiff, in reliance on that report, in November, 1889, of 50 shares of stock from Henry E. Lewis, for the price of \$7,250. The

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defendants filed separate answers, denying the material averments of the petition, pleading the statute of limitations, and also pleading that the action was one whereof the federal courts had exclusive jurisdiction, and that it had been removed to the circuit court for the district of Nebraska. At the close of the trial, the district judge peremptorily instructed the jury to return a verdict for all the defendants. The plaintiff brings the case here for review.

The plaintiff contends that he was entitled to relief under the provisions of section 5239 of the Revised Statutes of the United States, relating to the liability of directors of national banks. It, however, partly appears from the record, and is stated in both of the briefs, that the action was at one time removed to the federal court;

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Effect of Fed-
eral Decisions.

that a motion to remand was overruled, but that subsequently, the case arising in that court, JUDGE SHIRAS presiding, on a demurrer to the petition, it was found that the federal court had no jurisdiction, and the case was therefore remanded to the district court of Lancaster county. The opinion of JUDGE SHIRAS, remanding the case, is found in Gerner v. Thompson, 74 Fed. 125, and proceeds on the ground that an action under section 5239 of the Revised Statutes may be maintained only by the receiver of a bank, so that an action by a private individual against directors for making false reports must be maintained, if at all, as an action at the common law for deceit, and therefore presents no question under the laws of the United States. JUDGE SHIRAS also expresses his opinion to the effect that, in order to maintain an action under the federal statute, it must appear that a forfeiture of the bank's charter has been adjudged at the suit of the comptroller of the currency. Plaintiff vigorously attacks this opinion, especially the latter part. But, under the circumstances, we would not be free, if we were so disposed, to give the statute a construction different from that which was given it by the federal court in this very case. The construction of the statute

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was necessary for the purpose of the demurrer, and as leading to the order remanding the case; and it being a federal statute, construed by a federal court in determining its own jurisdiction, we are bound to accept the result of that construction, and are not at liberty to here review it. Railroad Co. v. Fitzgerald, 16 Sup. Ct. 389.

The defendants, to sustain the action of the trial court, contend that the action was barred by the statute of limitations; the first cause of action arising in 1887, the second in 1889, and the suit not having been brought until 1894. It is evident that, if the action may be maintained at this late date, it must be by virtue of section 12 of the Code of Civil Procedure, providing that actions may be brought "within four years * * * for relief on the ground of fraud, but the cause of action in such case shall not (be) deemed to have accrued until the discovery of the fraud." In order to bring the case within the exception of this statute, the plaintiff pleads "that defendants continued, after said 18th day of May, 1887, to be directors and managing officers of said corporation, and contrived, by repeated false statements of the resources and liabilities of said corporation, all of which were published and came to the notice of the plaintiff at the time of their being made and published, or shortly thereafter, and were by him believed to be true and relied upon, and by fraudulently declaring unauthorized dividends on its capital stock, that the corporate business might falsely appear to be profitable, to conceal from the plaintiff the condition of said corporation and the duty of said representations; and said defendants fraudulently, knowingly, and willfully so concealed its condition that plaintiff did not discover said reports and representations to be false until on or about the 1st day of April, 1894." The evidence quite clearly shows that the plaintiff did not in fact know of the real condition of the bank until about the time of its failure. It also appears that reports were, from time to time, published of the condition of the bank, down to about

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the time of its failure, and that such reports were all false. It appears, also, that dividends were declared from time to time, until shortly before the failure. It affirmatively appears, however, that none of the defendants, save Mosher and Outcalt, actually knew of the condition of the bank or the falsity of the reports, and that there was no actual intent on the part of such other defendants to mislead the plaintiff. We do not think that, under this evidence, the district court would have been justified in instructing for the defendants on the plea of limitations, and, in fact, the peremptory instruction was not based upon that ground.

It is contended by the defendants that the plaintiff, on becoming a stockholder, obtained the right of access to the books, and that even a cursory examination of the books would have disclosed the falsity of the reports; that he must, therefore, be held, on account of such means of knowledge, to have actually discovered the fraud on or about the time when he bought the stock. Assuming that a stockholder has an unlimited right to examine the books of the bank, still we cannot adopt the theory that the plaintiff, immediately on purchasing the stock, was under any legal obligation to make such examination for the purpose of ascertaining whether he had been defrauded in the purchase. It is true that in this state rather a strict construction has been placed upon this section of the statute of limitations, and it is here the law that the statute begins to run, not only from the actual discovery of the fraud, but from the time of the discovery of such facts as would put a person of ordinary intelligence and prudence on inquiry which, if pursued, would lead to such discovery. *Parker v. Kuhn*, 21 Neb. 413, 32 N. W. 74; *Wright v. Davis*, 28 Neb. 479, 44 N. W. 490; *Gillespie v. Cooper*, 36 Neb. 775, 55 N. W. 302; *State v. Boyd*, 49 Neb. 303, 68 N. W. 510. In *Gillespie v. Cooper* it was also said that the party defrauded must be diligent in making inquiry; that means of knowledge are equivalent to knowledge. But it was stated, in the same connection, that a clue

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to the facts, which if followed up diligently would lead to a discovery, is in law equivalent to a discovery. None of the cases holds, nor are we aware of any case elsewhere which holds, that a man must be so keenly on the scent of efforts to defraud him that, without knowledge of any fact which would lead a prudent man to suspect that he had been defrauded, he is bound to make investigations which he is not obliged to make for other purposes, merely because it is in his power to make such investigations. There was some proof introduced and some tendered tending to show that Mr. Gerner, considering that he was a stockholder only, and not a director, took quite a keen interest in the affairs of this bank, and was somewhat active concerning the same, but, giving such evidence its utmost effect, it could have been no more than a question for the jury whether or not he thereby became apprised of any fact which imposed upon him the active duty of resort to an examination of the books. Certainly, in the absence of all grounds of suspicion, he cannot be held, as a matter of law, to have been compelled to make such examination. To hold stockholders to such a degree of diligence would, in the case of many corporations, cause the real business of the corporation to be seriously impeded by the invasion of stockholders for such purposes, and, in the case of banks, would seriously impair the right of secrecy which customers possess as to the state of their accounts.

Before entering upon the more difficult questions relating to the merits of the case, it will be convenient at this time to dispose thereof so far as concerns the defendants Thompson, Phillips, Stuart, and Hamer. Neither of these defendants signed either of the reports which the plaintiff claims misled him. In order to charge them, the plaintiff alleged that the reports were made with the knowledge, assent, and co-operation of the defendants last named, and were, as each of them knew, false and untrue. The nature of the evidence on this point is accurately stated in the instruction of the trial court, as follows: "Plaintiff has failed in his

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evidence to produce a particle of testimony even tending to show that either Thompson, Hamer, Phillips, or Stuart knew, assented, or co-operated in the making or publishing of the said reports; and there is no attempt in the evidence on the part of the plaintiff to contradict the testimony given by each one of them touching their having no connection with the said reports on which plaintiff grounds his cause of action for deceit. The evidence utterly fails to show that either Thompson, Hamer, Phillips, or Stuart was guilty of any dishonest or fraudulent conduct in the making and publishing of said reports or either of them." The plaintiff seeks to avoid the effect of failure of proof in this report by the argument that the four directors, not joining in the reports were bound, as directors, to know the condition of the bank, and conclusively presumed, therefore, to know the falsity of the reports, and that the reports, being a corporate act, are their act as well as those actively participating.

We shall hereafter have occasion to discuss the duties of directors of national banks, but such discussion is not immediately pertinent to the question before us. The

reports relied on as constituting the false representations were made by virtue of section 5211 of the Revised Statutes of the United States, requiring reports to be made to the comptroller of the currency, "verified by the oath or affirmation of the president or cashier of such association, and attested by the signature of at least three of the directors." The statute further requires their publication. While, in a technical sense, the report being required of the association, it is a corporate act, nevertheless it is not such a corporate act as is or must be performed by the directors acting as a board. Nor are all the directors required to therein participate. It is not necessary that the president and cashier should both take part. The report may be verified by either of these officers, and it is sufficient if it be attested by the signatures of three of the directors. The language clearly shows that, in attesting, such directors act as

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individual directors, and not as a board. Being a corporate act, a report made by the designated officers would probably bind the corporation. In *Prescott v. Haughey*, 65 Fed. 653, it was said that false representations in such a report, if made under color of office, were entirely outside of the official duties of the directors; that neither the law nor the obligations of their office made it any part of their duty to utter and publish false and fraudulent advertisements and reports. It follows from this, if it were not true independently thereof, that a director cannot be held liable because he did not join in such an *ultra vires* act. The corporation may be bound by the act of its constituted officers, but, when it is sought to charge officers individually for *ultra vires* acts or for misconduct, it is only those who participate therein who are liable, in the absence, of course, of conspiracy or indirect participation, which was here not only unproved, but was affirmatively disproved. As to Thompson, Stuart, Phillips, and Hamer, it follows that the judgment must be affirmed.

The peremptory instruction of the district court as to the remaining defendants proceeded on the ground that the reports relied on as constituting the false representations were made for the information of the comptroller of the currency, and published for the information of those dealing with the corporation itself, and that they constituted no representation to other classes of persons, as to one contemplating an investment in the stock of the corporation; that, therefore, Gerner had no right to rely on the statements. We do not think that this position is sound. It certainly is not true, as contended by the defendants, that the sole object of the report is the information of the comptroller of the currency, because that object would be fully satisfied with the requirement that the report should be transmitted to him. In addition to this, a newspaper publication is required by the statute, and the corporation is required to furnish to the comptroller proof of such publication. As seen, publication is not necessary for the information of the

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comptroller, and it certainly is not required for the mere amusement of the public. We think the object is to afford public information to all persons having or contemplating business transactions into which the condition of the bank enters as a material factor. *Bank v. Thoms*, 28 Wkly. Law Bul. 164, while not the decision of a court of last resort, is enforced by so clear and so able an opinion that it logically carries more weight than many decisions of higher courts. It was there held that the purpose of requiring publication was of the general character we have indicated, and that one who was induced to lend money to a stockholder on the security of stock in the bank had his remedy against the officers fraudulently making the false reports. In *Graves v. Bank*, 10 Bush, 23, it was held that persons who were induced to become sureties on the bond of a cashier in reliance on such a report, which by its falsity concealed the cashier's past dishonesty, were by reason thereof discharged from liability. In *Prewitt v. Trimble*, 92 Ky. 176, 17 S. W. 356, a purchaser of stock was held entitled to a rescission of the contract, the vendor of the stock in that case being an officer who joined in the report. In *Tate v. Bates* (N. C.) 24 S. E. 482, a depositor was held entitled to relief. Such, also, was the case in *Seale v. Baker*, 70 Tex. 283, 7 S. W. 742. *Morse v. Swits*, 19 How. Prac. 275, is another case where the purchaser of stock was held entitled to relief for fraud in the published reports. The last case is criticised by the defendants because it cites *Bedford v. Bagshaw*, 4 Hurl. & N. 538, and that case was overruled by the house of lords in *Peek v. Gurney*, L. R. 6 H. L. 377. The reasoning in *Morse v. Swits* proceeds, however, on independent grounds, and *Bedford v. Bagshaw* went much further than any of the cases we have cited. In that case the listing of stock on the stock exchange was treated as a public representation that the stock was not less than two-thirds paid, the rules of the stock exchange requiring such payment as a condition of listing; while the case overruling it was to the effect

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that a prospectus of an intended company is for the purpose of inviting persons to become allottees of shares, and that, having served that purpose, its function is exhausted, and it may not be relied on by the purchaser of shares after the organization of the company. It will be seen that the two English cases are both entirely aside from any question now before us. In none of the cases has the court held that only those dealing directly with the bank, as depositors or holders of its circulating notes, are entitled to the information given by the report. While that doctrine has been argued in other cases, as in this, we cannot find that it has ever been sustained, and we have no doubt that the object of congress in requiring publication was as broad as we have above stated it. That being the object of the law, such reports become a public representation to all classes of persons falling within that object. This discussion argumentatively disposes of the further contention of the defendants that they are not liable because the publication was not voluntary, but was one required by law. Same—False Representations. We know of no rule of law which, holding men responsible for voluntary statements, excuses them for misrepresentations in statements which the law requires them to make for the very purpose that they may be relied on.

At this point the cases of Mosher and Outcalt diverge from that of Yates. As already stated, Mosher was the president of the bank and Outcalt its cashier. The proof shows that the affairs of the bank were largely conducted by Mosher, without Same—Knowledge of Officers. particular supervision by other officers.

There is also some proof of direct falsification of the bank's records by Mosher himself. Outcalt verified the reports. It can hardly be that the president and cashier of a bank, actively controlling and managing its business, can be excused for gross ignorance of the bank's condition. Moreover, the falsifications here complained of were not in the books of the bank, but in making up the report from those books; there

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being most glaring differences between the daily balance book of the bank, showing at a glance, its condition on the days to which the reports related, and the reports themselves. Very clearly, if Gerner had a right to rely on the reports, there was sufficient evidence, at least to go to the jury, for the purpose of charging Mosher and Outcalt, and the judgment as to them must be reversed.

The directors attesting the reports were Mosher, Holmes, and Yates. Holmes died before the action was begun, and, as already stated, the case seems to have been abandoned as to his administration. Yates was merely a director. He was not otherwise an officer or employee of the bank, and his liability, if any exists, depends upon his action as a director alone. It therefore becomes necessary to consider what was meant by the use of the word "attest," in section 5211 of the Revised Statutes, requiring reports to be attested by the signature of at least three of the directors. It will be observed that the word "attest" could not have been there used merely in the sense of witnessing the signature of the president or cashier. The language is not that such signature shall be attested, but that the reports shall be verified by the oath or affirmation of the president or cashier, and attested by the signature of at least three of the directors. It is the report itself, and not the act of the president or cashier, which is so attested. Furthermore, in the following section, national banks are required to report to the comptroller, within 10 days after declaring any dividend, the amount of such dividend, and the amount of net earnings in excess thereof, and "such report shall be attested by the oath of the president or cashier of the association." In the latter section the word "attest" is certainly used in the sense of certifying, in the manner indicated, to the correctness of the report, and its use in that evident sense, in such close juxtaposition to the language we are considering, reinforces the conclusion that by the attestation is meant something more than the mere

Same—"Attest"
—Definition of.

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witnessing of the report. It is true that it has been frequently held in this court that, in an action for false representations, it is not necessary to aver or prove a scienter. *Foley v. Holtry*, 43 Neb. 133, 61 N. W. 120; *Johnson v. Gulick*, 46 Neb. 817, 65 N. W. 883; *Moore v. Scott*, 47 Neb. 346, 66 N. W. 441. But it does not follow that one making a statement is charged absolutely with the consequences of its falsity in fact, regardless of the form of the statement and the circumstances under which it is made. Indeed, in the cases cited, the language used in one, and implied in the others, is that one is liable for the consequences of the false statement only when it is made as a positive representation of an existing fact. In *Moore v. Scott* the statement was qualified by the person's making the representation giving the source of his information as "a reliable person," and stating his belief on that ground, and it was held that he was not responsible thereby for the truth of the ultimate statement, but only for the truth of his receiving such information from a reliable person. We must, therefore, inquire whether Yates attested this report as a positive statement that the condition of the bank was as represented therein or whether, on the other hand, the attestation was qualified. The majority of the court is of the opinion that it was positive. Commissioner RYAN and the writer think it was qualified. The question involves a consideration of the duties of directors in national banks, and, as that question depends upon the construction of the national banking act, the federal decisions on the point conclude us. The question was considered with great care in *Briggs v. Spaulding*, 141 U. S. 132, 11 Sup. Ct. 924, and, while four justices there dissented on the ground that directors should be held to a higher degree of accountability than the majority opinion declares, we are bound to accept the opinion of the majority as controlling. The law there declared is substantially as follows: That the degree of care required of directors depends upon the subject to which it is to be applied, and each case to be determined from all its

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circumstances; that directors are not insurers of the fidelity of the agents whom they appoint, nor can they be held responsible for the misconduct of such agents, unless the loss resulting is a consequence of their own neglect of duty; that directors of a national bank must exercise ordinary care and prudence in the administration of the affairs of the bank, and this includes something more than officiating as figureheads; they may commit the banking business to the officers, but this does not absolve them from the duty of reasonable supervision, nor should they be permitted to shield themselves from liability because of want of knowledge of wrongdoing, if that ignorance is the result of gross inattention. The remaining points decided in the case cited relate to the application of the particular facts of that case to the rules laid down. Following the case cited, the circuit court for the Northern district of New York has held that where the affairs of a bank were managed solely by the cashier, who was reputed and universally believed to be honest and capable, directors who knew little of the business of banking were not guilty of negligence because they failed to examine the books, there being no grounds of suspicion known to them. *Warner v. Penoyer*, 82 Fed. 181. This being the rule of duty imposed on national bank directors, we think it follows that, when a director attests a report, he does so as a director, and with a view only to such knowledge of the condition of the bank as the exercise of his duties as a director imposes upon him. The verification by the oath of one of the chief active officers of the bank has, of course, a more extended scope as a representation; but the director is not required to make a special examination for the purpose of attesting, and attests a report only as the result of such knowledge as the proper discharge of his duties as director imposes upon him. That is, reading into the report, as we must, the director's legal duty. the words on these reports, "Correct: Attest," mean. in effect: "We, as directors, certify to the correctness of the foregoing report, basing our certification on the

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knowledge which we possess by virtue of a proper discharge of our duties as directors."

It is not, therefore, an absolute certification of the correctness of the report, but is qualified by the limited means of knowledge which a director may lawfully possess. Looking into the evidence with regard to Yates, we find that he was actively engaged in other business, requiring practically all his time; that he had never been engaged in the banking business; that he had never kept books of a bank, and in attesting the reports he relied upon the president, cashier, and employees for their correctness. They were brought to his office, and he signed them; assuming, therefore, that they were correct. He was himself a depositor, and lost money through the failure of the bank, and had the utmost confidence in the bank to the time it failed. The foregoing is from his own testimony. Examining this proof, together with the general testimony as to the manner in which the bank was managed, we think there was evidence sufficient to go to the jury to determine whether Yates' ignorance of the condition of the bank and the falsity of the reports was the result of that gross inattention which in *Briggs v. Spaulding* is held necessary to charge the director with a personal liability. It seems that he attended generally the meetings of the directors, but that he took no other steps to investigate the conduct of the business, reposing confidence and depending altogether on the supposed integrity of the officers of the bank. Whether, under the circumstances, he was justified in so doing, in assuming the reports to be correct and in attesting them, we think was fairly a question of fact, under the rules laid down in *Briggs v. Spaulding*, and therefore it was error to peremptorily instruct the jury to find in his favor. The judgment as to him must be reversed.

Affirmed as to Thompson, Phillips, Stuart, and Hamer. Reversed and remanded as to Mosher, Outcalt, and Yates.

RYAN, C., concurs.

NORVAL, J. While we are all agreed as to the

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judgment that should be entered herein, the majority of the court do not concur in the proposition expressed by IRVINE, C., to whom was assigned the duty of preparing the opinion of the court, that the attestation of reports of a national bank to the comptroller of the currency by the directors thereof does not amount to an absolute representation that such report is true, just, and correct. The learned commissioner cites, in support of the doctrine announced, *Briggs v. Spaulding*, 141 U. S. 132, 11 Sup. Ct. 924. This case is not controlling upon the question before us, and is distinguishable from the case at bar. That was a suit by a receiver of a national bank against its directors to recover losses and damages sustained by the bank by reason of the alleged neglect of duty and wrongful conduct of the defendants, while the present action was not instituted for and in behalf of the Capital National Bank, or by an individual creditor thereof, but by one who was induced to purchase stock of the bank in reliance upon the false report of the condition of resources and liabilities of the corporation made under oath of its president and cashier, and attested by certain of its directors. That the result probably would have been different in *Briggs v. Spaulding*, *supra*, if that suit had been grounded as the present one, or had been brought by a creditor to recover loss occasioned by his having been induced to make deposits in the bank through the false statements as to its financial condition, made to the comptroller, is clearly inferable from the following excerpt from the majority opinion, prepared by CHIEF JUSTICE FULLER: "The theory of this bill is that the defendants are liable, not to stockholders nor to creditors, as such, but to the bank, for losses alleged to have occurred during their period of office, because of their inattention. If particular stockholders or creditors have a cause of action against the defendants individually, it is not sought to be proceeded on here, and the disposition of the questions arising thereon would depend upon

Name—Attestation
—Liability of
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different considerations. * * * Treated as a cause of action in favor of the corporation, a liability of this kind should not lightly be imposed, in the absence of any element of positive misfeasance, and solely upon the ground of passive negligence; and it must be made to appear that the losses for which defendants are required to respond were the natural and necessary consequence of omission on their part." A bare majority of the court concurred in the decision in *Briggs v. Spaulding*, *supra*, four of the justices having dissented therefrom. The able dissenting opinion of JUSTICE HARLAN, filed therein, in which JUSTICES GRAY, BREWER, and BROWN concurred, held that the directors of a national bank could not abdicate their duties and functions, and leave the administration and management of its affairs solely to executive officers, but that the law requires of directors "such diligence and supervision as the situation and the nature of the business requires. Their duty is to watch over and guard the interests committed to them. In fidelity to their oaths, and to the obligations they assume, they must do all that reasonably prudent and careful men ought to do for the protection of the interests of others intrusted to their charge." But if the rule of the majority in *Briggs v. Spaulding*, *supra*, as to the degree of diligence required of directors of national banks, be accepted as sound, yet it is without controlling force in the present action. As to creditors of the corporation, and others not connected with the bank, most certainly a higher degree of diligence is required of the directors than obtains in a controversy between them and the bank itself. In the case to which reference has been made, the wrecking of the bank was not traceable to the false reports made by the directors to the comptroller; hence the question whether the bank directors are individually liable for any losses occasioned by their having attested false statements as to the condition of the corporation was not involved in the case or necessary to a decision.

The defendants in the present suit, who, as directors,

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attested the reports made by the Capital National Bank to the comptroller of the currency, by such act vouched for, or certified to, the absolute truthfulness of the statements therein contained, and not that the report was correct, so far as the directors knew or had been advised by the proper performance of their duties as directors. The means of information, this record shows, were accessible to them. It was their duty to know whether the reports were correct or not. For them to have ascertained the untruthfulness of the reports required no extended examination of the books of the bank or into the condition of its affairs. A mere comparison of any report with the daily balance sheet of the bank for the same date would have revealed the absolute falsity of such report. It is no answer to say that they were not aware of the insolvent condition of the bank. Section 5147 of the Revised Statutes of the United States requires "each director, when appointed or elected, shall take an oath that he will, so far as the duty devolves upon him, diligently and honestly administer the affairs of such association." The scope of the obligation assumed by the director of a national bank is indicated by the oath he is required to take. He is under obligation not only to honestly, but diligently, administer the affairs of the corporation in which he is a director. He may not sit supinely by, and permit the executive officers, which he has helped to elect, to rob and plunder the bank, and then excuse himself from individual liability by showing that he was unaware of the true condition of the bank or what was transpiring around him. The law demands and requires that he diligently administer the affairs of the association. In the language of SEVERENS, J., in *Gibbons v. Anderson*, 80 Fed. 345: "The idea which seems to prevail in some quarters, that a director is chosen because he is a man of good standing and character, and on that account will give reputation to the bank, and that his only office is to delegate to some other person the management of its affairs, and rest on that until his suspicion is aroused, which generally does not happen

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until the mischief is done, cannot be accepted as sound. It is sometimes suggested, in effect, that, if larger responsibilities are devolved upon directors, few men would be willing to risk their character and means by taking such an office; but congress had some substantial purpose when, in addition to the provision for executive officers, it further provided for a board of directors to manage the bank and administer its affairs. The stockholders might elect a cashier and a president as well. The banks themselves are prone to state and hold out to the public who compose their boards of directors. The idea is not to be tolerated that they serve as mere gilded ornaments of the institution, to enhance its attractiveness, or that their reputation should be as a lure to customers. What the public suppose, and have the right to suppose, is that those men have been selected by reason of their high character for integrity, their sound judgment, and their capacity for conducting the affairs of the bank safely and securely. The public act on this presumption, and trust their property with the bank in the confidence that the directors will discharge a substantial duty. How long would any national bank have the confidence of depositors or other creditors if it were given out that these directors, whose names so often stand at the head of its business cards and advertisements, and who are always used as make-weights in its solicitations for business, would only select a cashier, and surrender the management to him? It is safe to say such an institution would be shunned and could not endure. It is inconsistent with the purpose and policy of the banking act that its vital interests should be committed to one man, without oversight and control." See *Williams v. McKay*, 40 N. J. Eq. 189; *Martin v. Webb*, 110 U. S. 7, 3 Sup. Ct. 428.

In our view, whether the attesting directors possessed knowledge of the falsity of their reports is wholly immaterial. They were in fact false and untrue, and those who deposited money with the bank, or who purchased stock of the corporation, in reliance upon the truthfulness of the contents of those reports, were as

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much deceived and damaged thereby as though the directors when they signed the reports knew them to be false. That they were innocent of the true situation or condition of the affairs of the bank is wholly an unimportant consideration, since proof of a scienter is not necessary to a recovery. This court has frequently asserted that, to maintain an action for false representation, it is not essential that it be shown that they were intentionally or knowingly made by the defendant. This is the rule in ordinary causes, and no valid reason can be suggested or pointed out why the same principle should not apply in actions for deceit against the directors of a banking corporation. Certainly, no case has come under our observation which has made an exception in their favor.

In *Miller v. Howard* (Tenn. Sup.) 32 S. W. 305, it was disclosed that the directors of a national bank, on its suspension, issued a circular stating that the bank was solvent, and would open within 60 days, and authorized the officers to receive money on special deposit, and keep it in the bank vaults, subject only to the check of the depositor. Subsequently, a receiver for the bank was appointed, and the money deposited pursuant to said circulars was turned over to him. It was held that the directors were personally liable for the amount of such deposits. WILKES, J., in the course of his opinion, used this apposite language: "Directors are not mere figureheads, with no duties to perform, and with the liberty of leaving matters of this character to their president and cashier, and relieving themselves of liability and duty, by placing special funds they are under obligation to deliver to special depositors in the hands of third persons, and then leaving it to their depositors to litigate with such third persons over their claims and rights. * * * This is not a case of want of ordinary care on the part of the directors, but a case of positive, active, misconduct, which resulted in injury to complainant, and for which they are liable to him."

In *Cross v. Fisher*, 65 L. T. (N. S.) 114, with the knowledge and consent of the directors of a building

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society, advertisements were issued by the secretary inviting the loaning of money to it. Money advanced to the society was paid to the secretary, who receipted therefor, but did not enter the proper amount on the books of the society, and by reason thereof the secretary was enabled to appropriate to his own use a large sum of money, and upon his absconding it was discovered that the sum borrowed by the society was in excess of the amount allowed by its rules. It was held, in an opinion by MATHEW, J., that the directors were personally liable for the amounts borrowed by the society in excess of its borrowing powers.

Bank v. Thoms, 28 Wkly. Law Bul. 164, discloses the following state of facts: The executive officers of a national bank made reports to the comptroller of the currency, under oath, of the assets and liabilities of the corporation, and the same were attested by three of the directors. These reports were published according to law, and disclosed the bank to be in a highly prosperous financial condition, while in fact the statements in said reports were almost entirely false, and the bank at the time was almost insolvent. Relying upon the truth of the reports, plaintiff loaned a stockholder of the bank money, and received as collateral security a number of shares in said bank, which would have been ample security had the reports been true, but in fact the stock when the loan was made was worthless. The borrower was insolvent, and the loan was made solely on the credit of the stock so pledged, and upon the value thereof as the same appeared from the said reports. Plaintiff brought an action for deceit against the attesting directors of the insolvent bank, and the court held they were individually liable for the damages sustained.

Tate v. Bates, 118 N. C. 287, 24 S. E. 482, was an action by the state treasurer of North Carolina against the directors of an insolvent bank personally to recover for his loss of deposits. Tate claimed that he was induced to make the deposits, and permitted the same to remain in the bank by false and misleading published

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statements sworn to by the president and cashier, and verified by three directors, showing that the bank was solvent, its capital unimpaired, and that it had a surplus on hand. The court in the opinion say : "The directors are conclusively presumed to know the condition of the bank. *Hauser v. Tate*, 85 N. C. 81 ; *Morse, Banks*, § 137 ; *Finn v. Brown*, 142 U. S. 56, 12 Sup. Ct. 136 ; *Society v. Underwood*, 9 Bush, 609, and other cases cited in *Solomon v. Bates*, 118 N. C. 311, 24 S. E. 478. If the directors did not know the bank was insolvent, it was their duty to have known it. It was fraudulent for them to put forth official statements that the bank was solvent, when they did not know it to be true, and they are liable to those who were deceived thereby into having dealings with the bank, or making deposits therein, for any losses sustained. If this were not so, the directors of a bank would be privileged to be negligent, and the more ignorant they could manage to be about its condition the more secure they would be from liability."

Solomon v. Bates, 118 N. C. 311, 24 S. E. 478, was precisely like the preceding case. In the last case it was contended that the petition did not state a cause of

Same—Same—
Same—Pleading
and Proof.

action for deceit, because it did not charge that the defendants intended to deceive the plaintiff. The court in the course of the opinion said : "It is sufficient to allege that, the bank being insolvent, the defendants caused false and fraudulent statements of the condition of the bank to be published, representing it to be solvent, and with capital stock unimpaired, and declaring dividends, all this with a view to conceal its insolvent condition, and induce the public to make deposits, whereby the plaintiff was deceived, and made one deposit, which he is now seeking to recover. Indeed, the directors are liable for injury caused by relying upon a statement issued by them which they did not know to be true as well as when they knew it to be false. *Hubbard v. Weare*, 79 Iowa, 678, 44 N. W. 915 ; *Huntington v.*

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Attrill, 118 N. Y. 365, 23 N. E. 544; *Id.*, 42 Hun, 459; 3 Thomp. Corp. § 4244."

Notwithstanding this opinion has now reached an unusual length, we cannot refrain from making the following quotation from the decision in *Seale v. Baker*, 70 Tex. 289, 7 S. W. 742: "Directors of banking corporations occupy one of the most important and responsible of all business relations to the general public. By accepting the position, and holding themselves out to the public as such, they assume that they will supervise and give direction to the affairs of the corporation, and impliedly contract with those who deal with it that its affairs shall be conducted with prudence and good faith. They have important duties to perform towards its creditors, customers, and stockholders, all of whom have the right to expect that these duties will be performed with diligence and fidelity, and that the capital of the corporation will thus be protected against misappropriation and diversion from the legitimate purposes of the corporation. * * * It is the duty of the directors to know the condition of the corporation whose affairs they voluntarily assume to control, and they are presumed to know that which is their duty to know, and which they have the means of knowing. If the representations are false, but relied and acted on by a customer to his damage, to hold that in such case the directors who made such false representations are not liable, because they were ignorant of the falsity of such representations, would be to award a premium for negligence in the performance of important, and almost sacred, duties, voluntarily assumed, and to license fraud and deception of the most flagrant and pernicious character. It is a familiar principle of the law that an action for damages lies against a party for making false and fraudulent representations, whereby another is induced to do an act from which he sustains damage. If the representations are untrue, it is immaterial that they may have been made without fraudulent intent, and it is sufficient that they were made to the general

Note

public, if the appellant was induced thereby to deposit money in the bank."

The following authorities to some extent sustain the doctrine that a director of a bank is liable for damages resulting from permitting a statement to be held out to the public that the institution was solvent. *Same—Same—Same.* even though the director was unaware that such report was false: *Delano v. Case*, 121 Ill. 247, 12 N. E. 676; *Kinkler v. Junica*, 84 Tex. 119, 19 S. W. 359; *Bank v. Wulfekuhler*, 19 Kan. 60; *Salmon v. Richardson*, 30 Conn. 360; *Morse v. Swits*, 19 How. Prac. 275. Upon principle and authority, the conclusion is irresistible that directors cannot escape liability for damages resulting from false statements made by them of the condition of the bank, even though they were at the time ignorant that such statements were false. The judgment as to Thompson, Stuart, Phillips, and Hammer, should be affirmed, and reversed as to Mosher, Outcalt, and Yates.

HARRISON, C. J., SULLIVAN, J., and RAGAN, C., concur in the foregoing opinion of NORVAL, J.

NOTE.

Liability of Directors for False Reports.—If directors of a corporation issue false and fraudulent reports or prospectuses, any person into whose hands they come in the ordinary course of business, and who is misled thereby, has his action against the directors; *Cincinnati Cooperage Co. v. O'Keefe*, 20 N. Y. 603; *Cross v. Sacket*, 2 Bosw. (N. Y.) 617, 6 Abb. Pr. (N. Y.) 247; *Clarke v. Dickson*, 6 C. B., N. S. 453; *Bale v. Cleland*, 4 F. & F. 117; *Jarrett v. Kennedy*, 6 C. B. 319; *Gerhard v. Bates*, 2 El. & Bl. 476; *Woutner v. Sharp*, 4 C. B. 404; *Providence Steam Engine Co. v. Hubbard*, 101 U. S. 188; *Blake v. Wheeler*, 18 Hun (N. Y.) 496; *Pier v. George*, 20 Hun (N. Y.) 210; *Brockway v. Ireland*, 61 How. Pr. (N. Y.) 372; *Richards v. Crocker*, 19 Abb., N. Cas. (N. Y.) 73; *Morgan v. Skiddy*, 62 N. Y. 319, 326; *Paddock v. Fletcher*, 42 Vt. 389. See *Smith v. Chadwick*, L. R., 9 App. Cas. 187, 5 Am. & Eng. Corp. Cas. 23; *Petrie v. Guelph Lumber Co.*, 11 Supreme Court of Canada Rep. 451, 15 Am. & Eng. Corp. Cas. 487; *Edington v. Fitzmaurice*, L. R., 29 Ch. Div. 459, 10 Am. & Eng. Corp. Cas. 78; *Carley v. Hodges*, 19 Hun (N. Y.) 187; *Glens Falls Paper Co. v. White*, 58 How. Pr. (N. Y.) 172. See *Vernon v. Palmer*, 6 How. Pr. (N. Y.) 425; *Hewlett v. Epstein*, 63 Cal. 184; *Bolz v. Ridder*, 12 Daly (N. Y.) 329; *Duckworth v. Roach*, 8 Daly (N.

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Y.) 159; Sears *v.* Waters, 44 Hun (N. Y.) 101; Huntington *v.* Attrill, 42 Hun (N. Y.) 459; Simons *v.* Vulcan Oil, etc., Co., 61 Pa. St. 202; Gaus *v.* Switzer, 9 Mont. 408; Wallace *v.* Walsh (N. Y.), 25 N. E. Rep. 1076; Priest *v.* White, 89 Mo. 609.

But to charge an officer for signing a false report, knowing it to be false, some fact or circumstance must be shown indicating that it was made in bad faith or for some fraudulent purpose, and not ignorantly or inadvertently, and this is a question of fact which must be passed upon before the liability can be adjudged. Pier *v.* Hanmore, 86 N. Y. 95.

The directors of a tramway company issued a prospectus in which they stated that they were authorized to use steam power, and that by this means a great saving in working would be effected. At the time of making this statement they had not, in fact, obtained authority to use steam power, but they honestly believed that they would obtain it as a matter of course. *Held* (reversing the judgment of the court below, 21 Am. & Eng. Corp. Cas. 243), that they were not liable in an action of deceit brought by a shareholder who had been induced to apply for shares by the statement in the prospectus. Derry *v.* Peek, 14 App. Cas. (H. L.) 337, 26 Am. & Eng. Corp. Cas. 341.

Where, in an action to enforce the liability imposed by statute on the trustees of a manufacturing corporation, for making a false report, the falsity charged consists in a statement that the capital stock had been paid up in full, without stating that a portion was paid for in property, *held*, that bad faith or a fraudulent purpose must be shown, as the penalty follows an actual, not a constructive, falsehood. Bonnell *v.* Griswold, 89 N. Y. 122.

If the report filed be untrue and constitute a false representation, it renders liable only the officer who signed it, knowing it to be false. Pier *v.* Hanmore, 86 N. Y. 95.

STATE *ex rel.* ANDERSON *et al.*

v.

THUM.

(Supreme Court of Idaho, Dec. 16, 1898.)

Banks—Insolvency—Public Moneys as Trust Funds.*—Public money deposited by a public officer in a bank becomes a trust fund, and not part of the estate of the bank; and in case of the insolvency of the bank its receiver must treat such fund as the property of the true owner, and not of the bank.

Same—Same—Same.—The creditors of an insolvent bank are not entitled to share *pro rata* in public money deposited in such bank.

Pleading.—A defect in a complaint may be cured by allegation in the answer.

SULLIVAN, J., dissenting.
(Syllabus by the Court.)

*See notes at end of case.

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APPEAL from Bingham county district court.

Petition by the state, on the relation of J. H. Anderson, state auditor, and R. E. McFarland, attorney general, in an action by the First National Bank of Pocatello against C. Bunting & Co. The respondent, C. E. Thum, was appointed receiver of C. Bunting & Co., bankers, an insolvent corporation, on the 15th day of February, 1897, by order of the district court of the Fifth judicial district, made in the action brought by the First National Bank of Pocatello against said C. Bunting & Co., bankers. On February 8, 1898, the state *ex rel.* J. H. Anderson, state auditor, and R. E. McFarland, attorney general, pursuant to order of said district court granting leave so to do, filed its petition in said action, in which it is alleged: That one George H. Storer was duly elected at the regular November election in 1896 state treasurer of the state of Idaho, and duly qualified as such officer, and assumed the duties of said office; that said Storer, as such treasurer, has deposited in and with said C. Bunting & Co., bankers. large sums of money, belonging to the state, and which came to his hands as such treasurer; that said moneys were received by said C. Bunting & Co., bankers, and credited on its books to said George H. Storer as treasurer, with full notice and knowledge that said moneys belonged to and were the property of the state; that said corporation is insolvent, and has suspended payment, and is unable to pay its indebtedness, and that there came to the hands of the respondent, C. E. Thum, as receiver of said banking corporation, the sum of \$11,101.16, money of the state; that the state has demanded payment of said sum from said receiver, but said receiver fails and refuses to pay same to the state; that said receiver has disbursed large portions of the assets of said banking corporation, and threatens and intends to pay out and distribute the remaining assets of said banking corporation remaining in his hands, and said money of the state, to the creditors of said corporation; that said receiver claims that said money deposited by

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said Storer as treasurer belongs to, and is a part of, the estate of the said corporation, and will, unless otherwise directed by the court, pay out said money to the creditors, whereby same will be lost to the state. To this petition the respondent made answer, in which he denies that said Storer deposited any sum or sums of money belonging to the state; that there is a credit on the books of said C. Bunting & Co., bankers, to the credit of said Storer, state treasurer; that said credit is the result of deposits of checks made by said Storer; that when said Storer came into office as such treasurer there were, to the credit of C. Bunting, state treasurer, his predecessor, large sums of money deposited in said bank by his predecessor; that said Storer received from his predecessor a check for such sum; and that said Storer continued to keep, as state treasurer, with said bank, an account based upon credit received from checks from his predecessor, and other checks, and that said Storer deposited no money or cash in said bank. The evidence shows that C. Bunting, former treasurer, gave to his successor, George H. Storer, state treasurer, January 6, 1897, a check for \$32,702.58, and which check was credited by said bank to said Storer, state treasurer; that C. Bunting, as state treasurer, deposited funds of the state with said bank, and there was to his credit, as such treasurer, in said bank, on January 6, 1897, more than \$32,702.58. Said Storer, state treasurer, deposited other checks in said bank, and drew his checks thereon, leaving, on February 15, 1897, a balance to his credit as state treasurer of something over \$11,101.16. On the trial, after the above facts had been proven, the respondent moved for a nonsuit, which the trial court granted, whereupon judgment was entered dismissing the appellant's petition. From this judgment the state appeals. The evidence is set forth in appellant's bill of exceptions. Reversed.

R. E. McFarland, Atty. Gen., and *Hawley & Puckett*, for the State.

Lyttleton Price, for respondent.

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QUARLES, J. (after stating the facts). The contention of the respondent that public money deposited in a bank on general deposit, by a public officer, in violation of law, becomes the estate and property of the bank, the owner of the money so deposited, contrary to its will, becoming a mere creditor of the bank, raises the principal question in this case. The district court sustained this contention. We are unable to do so. The position of the state in this case is unlike that of an ordinary depositor in a bank. A party who deposits money in a bank on general deposit voluntarily becomes the creditor of such bank, and, impliedly at least, agrees that the bank may commingle such money with its own, and use it until called for by such depositor. The relation of debtor and creditor arises by mutual consent. Not so in the case at bar. The state never consented to become the creditor of C. Bunting & Co., bankers. It never deposited, or consented that the funds in question should or might be deposited, with said bank on general deposit. On the other hand, the state absolutely prohibited the making of such deposit. Sections 6975 — 6977, Rev. St., are as follows:

“Sec. 6975. Each officer of this territory, or of any county, city, town, or district of this territory, and every other person charged with the receipt, safe keeping, transfer, or disbursement of public moneys, who either:

“1. Without authority of law, appropriates the same or any portion thereof to his own use, or to the use of another; or,

“2. Loans the same or any portion thereof; or, having the possession or control of any public money, makes a profit out of, or uses the same for any purpose not authorized by law; or,

“3. Fails to keep the same in his possession until disbursed or paid out by authority of law; or,

“4. Deposits the same or any portion thereof in any bank, or with any banker or other person, otherwise than on special deposit; or,

“5. Changes or converts any portion thereof from

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coin into currency, or from currency into coin or other currency, without authority of law; or,

"6. Knowingly keeps any false account, or makes any false entry or erasure in any account of or relating to the same; or,

"7. Fraudulently alters, falsifies, conceals, destroys, or obliterates any such account; or,

"8. Willfully refuses or omits to pay over, on demand, any public moneys in his hands, upon the presentation of a draft, order, or warrant drawn upon such moneys by competent authority; or,

"9. Willfully omits to transfer the same, when such transfer is required by law; or,

"10. Willfully omits or refuses to pay over to any officer or person authorized by law to receive the same, any money received by him under any duty imposed by law so to pay over the same; is punishable by imprisonment in the territorial prison for not less than one nor more than ten years, and is disqualified from holding any office in this territory.

"Sec. 6976. Every officer charged with the receipt, safe keeping, or disbursement of public moneys, who neglects or fails to keep and pay over the same in the manner prescribed by law, is guilty of felony.

"Sec. 6977. The phrase 'public moneys' as used in the two preceding sections, includes all bonds and evidences of indebtedness, and all money's belonging to the territory, or any city, county, town, or district therein, and all moneys, bonds, and evidences of indebtedness received or held by territorial, county, district, city or town officers in their official capacity."

The former treasurer, C. Bunting, had no authority to deposit public money in the bank of C. Bunting & Co., bankers, on general deposit. The bank had, and was charged with express notice that the state treasurer had, no authority to make such general deposit. More than that; the bank, nor the officers of said bank, after receiving said money, could mingle it with the funds of the bank, or loan it, or make profit out of it,

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or appropriate it, without committing a felony. If a bank receives public money, it must do so on special deposit. It must keep such money separate from its own funds. It must not use it or loan it. If any of these acts are committed, the persons or officers who participate are guilty of a felony. Now, it must necessarily follow that, the state treasurer, having no authority to deposit public money with a bank on general deposit, but he being authorized to deposit such money with a bank on special deposit, the instant that C. Bunting & Co. received public money from the state treasurer, it did so on special deposit, and that if the officers or any officer of said bank thereafter used said money, or commingled it with the money of the bank, or loaned it, such officers or officer, by such act, committed a felony. The bank could not appropriate it. Hence it did not become the estate or property of the bank. If the bank was still doing business, it could not claim the money in controversy, or any part thereof, as its own. It could assert no claim adverse to the state to such money, or any part thereof. The respondent, as receiver of said bank, can assert no claim to said money which the bank could not itself assert if it was still doing business. The creditors of the bank have no interest or claim upon said money. The joint wrong and criminal act of the agent of the state and of the officers of the bank does not redound to the financial interest of the creditors of the bank. The bank received the money in trust for the true owner, the state. It must be regarded as a trustee. *Wolffe v. State*, 79 Ala. 201; *Bank v. Hummel*, 14 Colo. 259, 23 Pac. 986; *State v. Midland State Bank* (Neb.) 71 N. W. 1011; *Foster v. Rincker* (Wyo.) 35 Pac. 470; *Kimmel v. Dickson* (S. D.) 58 N. W. 561; *Mechem*, Pub. Off. § 922; *Winslow v. Iron Co.* (Tenn. Ch. App.) 42 S. W. 698; *Hubbard v. Manufacturing Co.* (Kan. Sup.) 36 Pac. 1053; *Ryan v. Phillips* (Kan. App.) 44 Pac. 909; *City of Larned v. Jordan* (Kan. Sup.) 39 Pac. 1030. We could cite many other authorities to the same effect. In *Vale v. Towle*,

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50 Pac., we said, at page 1008: "Trustees must, in dealing with trust funds, and with the beneficiaries thereof show the utmost good faith and fair dealing. They can make no profit out of the trust funds, nor obtain any advantage over the beneficiaries of such funds; and a trustee cannot assert an adverse claim to funds which he receives in his fiduciary capacity." The respondent, as a receiver, is in the same position as the bank. He can assert no adverse claim against the state to the money in question. That fund, being a trust fund, is no part of the insolvent bank's estate. It must be paid to the state before the bank's estate is distributed. Creditors of a bank need not expect, under the laws of this state, to have public funds in the bank distributed among themselves in case of the failure of such bank. Could it be contended that if A. robbed B. of a large sum of money, and then went into insolvency, that that money should be distributed among A.'s creditors? Certainly not. We cannot give our consent to the doctrine or theory that if two persons, in handling a particular fund, commit a felony with reference to such fund, their criminal act divests the owner of title, or creates the relation of debtor and creditor between the true owner of such fund and the parties who commit the criminal act.

Same—Same—
Same.

The respondent insists that the motion for nonsuit was properly granted on the ground of variance between the allegation and proof. It is true that the evidence shows that some or all of the money in question was deposited with C. Bunting & Co., bankers, by the former treasurer, and not by the present one. In this respect the petition is defective. But such defect is cured by the allegations of the answer, wherein it is alleged that such money was placed in said bank by C. Bunting, former treasurer, who gave his check therefore to Treasurer Storer. The judgment appealed from is reversed, and the cause remanded to the district court, with instructions to enter judgment in favor of the state as demanded in the

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petition, and to direct the respondent, C. E. Thum, as receiver, to pay the said judgment out of assets of the said C. Bunting & Co. in his hands before any distribution of such assets among the creditors of said banking corporation. Costs of appeal to be paid out of funds in the hands of said receiver.

SULLIVAN, C. J., and HUSTON, J., concur.

On Rehearing.

(Jan. 11, 1899.)

HUSTON, C. J. A rehearing is asked in this case principally upon the ground that the respondent had no opportunity of presenting any evidence in the court below. It seems to us, this claim comes a little late. The record shows that when the case was called for trial the respondent was placed on the stand by plaintiff, and testified as follows :

"I am the receiver in the cause of First National Bank of Pocatello *v.* C. Bunting & Co., Bankers, and have been since February 15, 1897, and prior to that time had been, an employee in the bank of C. Bunting & Co. Had charge of the books of that bank. C. Bunting was state treasurer of Idaho prior to the beginning of the term of office of Geo. H. Storer, the present treasurer. In January, 1897, Bunting, as treasurer, turned over to Storer, as his successor, the office of state treasurer. Part of the state money was on deposit in the Capital State Bank of Boise City, and part in the Bank of C. Bunting & Co., Blackfoot. The books of C. Bunting & Co., bankers, show that there was deposited to the credit of Geo. H. Storer, as state treasurer, on January 6, 1897, the sum of \$32,702.58, and that afterwards there was deposited by said treasurer the sum of \$8,477.27, and that there was paid out upon the checks of the treasurer and for state warrants all of said amounts except the sum of \$12,683.93, shown by the books to be due, but which has been reduced by reason of certain interest amounts paid out, and not determined at the time the bank was closed, but which I

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have, as receiver, since ascertained to be the sum of \$11,022.38.

"The account of C. Bunting, as state treasurer for 1897, as shown by the book of original entries, in which said account was kept, is as follows:

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C. Bunting, State Treasurer.

1897.

1897.

Jan. 4	163, 162, 164	7	991 85	Jan. 2	Bal. L.	299	34,726 80
5		9	504 16				28 21
6		12	32,702 58				
7		13	350				
8		15	150				
	Balance		28 21				28 21
			28 21				28 21
				Feb. 15	Balance		28 21

"The account of George H. Storer, as state treasurer, as shown by said book, is as follows:

George H. Storer, State Treasurer.

1897.

1897.

Jan. 27		35	351 15	Jan. 6		11	32,702 58
28		36	114 66	29		37	8,477 27
Feb. 11		52	9,173 27				40,714 04
13	State Warr'ts	54	19,552 84	Feb. 1		40	696
	Balance		12,683 93				
			41,410 04				41,410 04
				Feb. 15	Balance		12,683 93

"(To the introduction of said accounts as evidence the defense objected on the grounds that it was incompetent, immaterial, and irrelevant. Objection overruled, and exception taken.)

"The book from which these accounts are taken is the general ledger of the bank, which is a book of origi-

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nal entries, and the only book of the bank which shows accounts. The entry on the Storer account of \$32,702.50, represents that part of the fund which was on deposit in the bank at Blackfoot, turned over by C. Bunting to Storer at the time Bunting turned over the office of state treasurer. This sum was turned over by means of a check drawn by C. Bunting, state treasurer, on C. Bunting & Co., bankers, and payable to George H. Storer, treasurer. The other entries in the Storer account represent checks turned into the bank by Storer. It was the custom in the bank to credit the checks received, when they were considered good, at the time of their receipt. There is nothing in the bank to show any of these checks were dishonored, and, as a matter of fact, they were all paid."

The testimony of the respondent was the only oral proof offered in the case, and, together with the exhibits produced by him, constitute all the evidence in the record. After the evidence was closed, the respondent moved for a nonsuit, which was granted.

How can the respondent claim that he had no opportunity to present any evidence? While respondent was upon the stand he was subjected to a very rigid cross-examination by his own attorney, during which, in answer to certain interrogatories propounded to him, he stated, in substance: That on the 6th day of January, 1897, the amount of money in the bank of C. Bunting & Co. was about \$11,000; that up to a short time before failure, the daily balance averaged about \$10,000. The contention of respondent is that there never was any money deposited by Storer; that he only deposited checks. These checks were under the provisions of section 6977, Rev. St. Idaho, "public moneys," and as such were deposited by the treasurer, Storer, in the bank of C. Bunting & Co., and were so received by said bank, and were made available by the treasurer in paying the indebtedness of the state. \$41,410.04 was so deposited by the treasurer, and of this amount, according to the testimony of respondent, all but \$11,022.38 was checked out by the treasurer, and yet counsel con-

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tends that no money was ever deposited. This contention seems to us a *non sequitur*. The law made the checks of Bunting or any one else in the hands of the treasurer "public moneys." As such they were deposited by the treasurer, and were checked against by him in paying liabilities of the state, and all such checks were paid. Respondent appears to lay considerable stress upon the fact that the average daily balances in the bank from January 6th to the time of the failure were only about \$10,000. While not as conversant with the details of the banking business as the learned judge of the district court, or the learned counsel, it seems to us that the daily balances, as shown by the books of the bank, could hardly be accepted as conclusive of the amount of daily deposits. A bank may receive \$100,000 to-day on deposit and through collections, and may on the same day, by loans and otherwise, disburse \$105,000. Its daily balance in such case would be the same as the day before less \$5,000; but would that be indicative, even, much less conclusive, of the amount of deposits received or of business done on that day? We have examined with much care the case of *Beard v. Independent Dist.*, 31 C. C. A. 562, 88 Fed. 375. That case arose under statutes entirely unlike those of this state. In that case the court says (page 377): "The question for decision is, what rule should be followed by a receiver of a national bank in distributing the assets of the bank, which have come into his hands under the provisions of the laws of the United States, in cases wherein it appears that trust funds have been received by the bank in the course of its business?" Such is not the question in this case. The bank of C. Bunting & Co. was not a national bank. The assets of that bank did not come into the hands of the respondent as receiver under any law of the United States. The court in the case in 31 C. C. A. 562, 88 Fed. 375, seems to hold that the real point at issue in that case was, were the funds of the bank augmented by the addition thereto of the trust funds? We do not

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see how such a question could be raised under the proofs in this case.

We are unable to see that any different result could be reached in this case from further argument. In fact, the question in this case does not seem to be so much one of fact as the application of the law to facts about which there is no contention. Counsel for respondent contends that the deposit of the checks by Storer was not a deposit of money such as would create a trust fund on the part of the state. With this contention we cannot agree without abrogating the provisions of our statutes. The plaintiff would, we think, have been entitled, on motion, to a judgment on the pleadings in this case. The depositing of the checks by Storer is admitted by the answer, and, said checks being "public moneys" in the hands of said Storer, and, being by him deposited as "public moneys" in the bank of C. Bunting & Co., we are unable to see what there is to be urged against a judgment for plaintiff upon the pleadings. Rehearing denied.

QUARLES, J., concurs.

SULLIVAN, J. (dissenting). Respondent contends, in his petition for a rehearing, that the only question of law presented on appeal was: Did a trust relation arise from a deposit of money in the Bunting bank by Storer, as state treasurer, and which had come to the receiver's hands, which would allow the state to pursue and take it? It is contended: That it never was claimed that a deposit by Storer's predecessor in office, Bunting, could be shown, or was shown, as a basis for recovery in this action, or that there was any admission in respondent's answer that would relieve the appellant from proving his allegations. That it appeared from the opinion of the court that an actual deposit of money belonging to the state was a necessity to the state's recovery. That as there was no proof of Storer's having made any deposit, the court then considered whether recovery could be had upon the evidence or admissions that Storer's predecessor had deposited

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money there. And in support of this contention quotes from the opinion the following: "The respondent insists that the motion for nonsuit was properly granted on the ground of variance between the allegation and proof. It is true that the evidence shows that some, or all, of the money in question was deposited with C. Bunting & Co., bankers, by the former treasurer, and not by the present one. In this respect the petition is defective. But such defect is cured by the allegations of the answer, wherein it is alleged that such money was placed in said bank by C. Bunting, former treasurer, who gave the check therefor to Treasurer Storer." And contends that the court misapprehended petitioner's position in this, to wit: that it is not a variance between allegation and proof, but that it is a clear failure of proof. Also contends that the court mistakes the fact when it says: "It is true that the evidence shows that some, or all, of the money in question was deposited * * * by the former treasurer, and not by the present one." And contends that all the testimony goes to what appears from the books only, and, on this subject, nothing of the witness' own knowledge. It is also contended that the evidence failed utterly in establishing the allegation that Storer made any deposit whatever as alleged. It is also contended that it was not shown where the money belonging to the state was deposited, and quotes the following from the testimony of the state's witness, the receiver, to wit: "Mr. Bunting gave Storer two checks, one of which was drawn on the Capital State Bank at Boise and the other on C. Bunting & Co.'s Bank at Blackfoot. These two checks represented the funds in the state treasury at that time. I know this, because I examined the state treasurer's books. I don't know where the money was that belonged to the various funds. Storer gave Bunting a receipt for the checks." It is also urged that the court evidently misapprehends the averments in the answer wherein the opinion states that the "petition is defective," but that such defect is cured by the answer, and contends that the averments in the answer do not admit

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that Bunting, as state treasurer, made a deposit of state funds in said bank; and quotes the following from the answer: "Said receiver denies that the said pretended or any moneys mentioned in the said petition ever were or are now credited on the books of C. Bunting & Co., bankers, defendants, or that the same were ever received by said C. Bunting & Co., bankers, with full or any notice or knowledge that the said moneys belonged to the petitioner, the state of Idaho, or that any moneys were ever deposited by him at all." "Further answering the said petition, said receiver denies that the said or any moneys whatever belonging to the state of Idaho ever came to his hands, as receiver or otherwise." "There was a credit on the books of the said defendant bank to C. Bunting, as state treasurer, of a considerable sum of money," etc., and, in folio 26, "His said predecessor gave him a check on the defendant bank for the full amount of money in his (not the bank's) hands belonging to the state," etc. And contends that said averments are all that is contained in said answer touching said subject, and that said allegations do not admit a deposit by Bunting, either directly or indirectly, by intendment or by fair construction; that it denies that any deposit of the state money was ever made in said bank by anybody, at any time. The point made by the foregoing is that the proof failed as to the particular thing alleged in the petition, to wit, that the deposit was made by Storer, state treasurer, and that the defect in proof was not made good by admissions in the answer. It is also contended that the court erred in remanding the case with instructions to enter judgment for the state. The appeal was from a judgment of nonsuit, granted on motion of the respondent. Said motion was made at the close of plaintiff's evidence, and before the defendant had put in any evidence whatever. It is contended that by remanding the case with instructions to enter judgment for the state the defendant is deprived of the right to make a defense on the merits and facts of the case; that such proceeding is not due process of law, and denies the defendant a sub-

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stantial right,—that of making his defense on the merits.

In *Bagley v. Eaton*, 10 Cal. 149, it is held as follows: "It is not our practice to direct the entry of a judgment in the court below in actions at law, except when the facts have been found by the judge who tried the cause, or by the special verdict of a jury, or when, from the character of the action or pleadings, one of the parties is entitled to judgment without proof." In *Cooper v. Shepardson*, 51 Cal. 300, the court reversed the case, but declined to order final judgment; saying, "It may be that upon a new trial a different case will be made out." Hayne, in his work on New Trial and Appeal (section 296), holds that, when all of the material facts are established in the court below, the supreme court, in reversing a judgment, may, in its discretion, direct final judgment. In the case at bar the material facts were not found by the court below. Judgment of nonsuit was entered against the plaintiff at the close of its evidence. The court found no facts upon which a judgment could be based in favor of the state; and in that case this court must find such facts in order to direct a judgment against the defendant, who is respondent here. To do so would be to exercise original, rather than appellate, jurisdiction. Of course, a different question would be presented if, under the pleadings, the appellant was entitled to judgment without proof; and in that case a trial court, on proper application, would allow the pleadings to be amended.

The opinion of the court is based on the ground that Bunting, Storer's predecessor, deposited state money; and that conclusion is reached by holding that the answer cures a defective allegation in the complaint. On a careful re-examination of the pleadings, I am of the opinion that the answer does not admit that the predecessor of Treasurer Storer deposited said money in said bank. The admission that said bank books show credit to said predecessor is not such an admission as would warrant the court in finding that said Bunting did make a deposit of state money when such deposit is specifically denied by the answer. The averment is

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that there was a credit on the books of the defendant bank to C. Bunting, as state treasurer, of a considerable sum of money. That admission is not sufficient to hold that Bunting deposited therein over \$32,000 of the state's money, or of any amount whatever, without proof.

While it is true the evidence introduced by the state tends to show that Bunting, as state treasurer, had a credit in said bank, and of the amount thereof, the defendant had a right, under his answer, to show that said credit was a fictitious one, or that no public money had, as a matter of fact, been deposited in said bank. This is not an action between the Bunting Banking Company and the state, but against the receiver, who represents all of the creditors of said bank; and the creditors, through the receiver, have the right to make any legal defense that will defeat the state's claim.

This court has in this case only appellate jurisdiction, and, as the court below has found no facts on which a judgment can be based, this court cannot usurp the jurisdiction of the *nisi prius* court, and in the first instance find facts on which to base a judgment. I do not think the pleadings are such as would warrant a judgment on them without proof. The cause should have been remanded, and the receiver given an opportunity to present his defense.

While it is true the receiver, as a witness for the plaintiff, testified that said ledger was a book of original entry of said bank, it is not shown who made said entries, or that they are correct.

The opinion of the majority of the court on the petition for a rehearing presents an additional reason for an opinion in favor of the state that was not suggested in oral argument or by brief on the hearing of the case, and that is that the checks deposited by Storer were "public money," under the provisions of section 6977, Rev. St. That point was not mooted on the hearing of this case and it is only right and fair to the respondent that he should be heard upon points on which the

Notes

decision rests. If it be said the check was public money, and must be considered such in this case, it may be that the receiver will be able to return said check—"public money"—to the plaintiff, and thus return to the state the identical "public money" deposited by Treasurer Storer; and, if the state gets the identical "public money" which it deposited by its treasurer, it ought not to complain.

The circumstances under which the case was presented to this court were most unfavorable, and the importance and far-reaching effect of the decision demand that the parties should be fully and fairly heard, and I think a rehearing should be granted.

NOTES.

Deposits by Officials and Trustees—Presumption of Ownerships.—The depositor is presumed to be the real owner of the funds standing in his name. *Egbert v. Payne*, 99 Pa. St. 239; *Lock Haven First Nat. Bank v. Mason*, 95 Pa. St. 113, 40 Am. Rep. 632.

Same—Same—How Presumption is Overthrown.—The presumption is overcome by proof of circumstances attending the deposit which would constitute notice of a different ownership, but the burden of proof is on the claimant of the fund as against the depositor. *Egbert v. Payne*, 99 Pa. St. 239.

Following Trust Deposits.—Trust funds remain charged with their fiduciary character, although deposited to the trustee's individual credit and mingled with his personal moneys, and the beneficiary can follow them and assert his claim on the balance in the banker's hands. Where the trustee has drawn checks generally against the funds so confused, he will be taken to have drawn out his own in preference to the trust money. *Importers', etc., Nat. Bank v. Peters*, 123 N. Y. 278; *Van Alen v. American Nat. Bank*, 52 N. Y. 1; *Wethrell v. O'Brien*, 140 Ill. 146, 33 Am. St. Rep. 221.

Hodgin v. People's Nat. Bank

HODGIN

v.

PEOPLE'S NAT. BANK.

(*Supreme Court of North Carolina, April 25, 1899.*)

Right to Apply Deposits to Debts.*—A bank has the right to apply the debt due by it for deposits to any indebtedness by the depositor, in the same right, to the bank, provided such indebtedness to the bank has matured.

Same—Insolvency of Depositor—Set-Off.†—Even if such an indebtedness to the bank has not matured, if the depositor becomes insolvent, the bank, by virtue of the right of equitable set-off, may apply the deposits with it of such debtor to his indebtedness.

Same—Deposits by Surviving Partner—Presumptions.—Where there is no evidence to the contrary, the presumption is that money deposited by a surviving partner, and kept under the old heading on the bank's books, was deposited in behalf of the partnership, as a continuation of the old line of deposits; and that, on the insolvency of the partnership, the bank is entitled to apply such deposit to antecedent debts owing to it by the partnership.

Same—Partner's Individual Debts.—But, even though a partnership is insolvent, a bank has no right to apply deposits in behalf of the firm, whether made during its existence or by the surviving partner, to the individual indebtedness of a member of the partnership, and it is immaterial, in this connection, that such indebtedness is a note of one partner indorsed by the other.

APPEAL by plaintiff from Forsyth county superior court. *Reversed.*

Holton & Alexander, Shepherd & Busbee, E. E. Gray, and Charles Price, for appellant.

Glenn & Manly, Watson, Buxton & Watson, Jones & Patterson, and A. H. Eller, for appellee.

CLARK, J. A bank has the right to apply the debt due by it for deposits to any indebtedness by the de-

*See *Columbia Nat. Bank v. German Nat. Bank (Neb.)*, *ante*, p. 43 and *note*, p. 47.

†See *note, ante*, p. 48.

Hodgin *v.* People's Nat. Bank

positor, in the same right, to the bank, provided such indebtedness to the bank has matured.

Bank *v.* Hill, 76 Ind. 223; Knapp *v.* Cowell, 77 Iowa, 528, 42 N. W. 434; Coates *v.*

Right to Apply Deposits to Debts.

Preston, 105 Ill. 470; Bank *v.* Bowen, 21 Kan. 354; Clark *v.* Bank, 160 Mass. 26, 35 N. E. 108; Bank *v.* Armstrong, 15 N. C. 519; Muench *v.* Bank, 11 Mo. App. 144; Morse, Banks, § 324; Bank *v.* Hughes, 17 Wend. 94; Eyrich *v.* Bank, 67 Miss. 60, 6 South. 615.

Even if the indebtedness to the bank has

not matured, if the depositor becomes insolvent, the bank, by virtue of the right of

Same—Insolvency of Depositor—Set-off.

equitable set-off, may apply the deposits

with it of such debtor to his indebtedness.

Dammon *v.* Bank, 50 Mass. 194; Kentucky Flour Co.'s

Assignee *v.* Merchants' Nat. Bank, 90 Ky. 225, 13 S.

W. 910; Nashville Trust Co. *v.* Fourth Nat. Bank, 91

Tenn. 336, 18 S. W. 822; Georgia Seed Co. *v.* Tal-

madge & Co., 96 Ga. 254, 22 S. E. 1001; Wat. Set-Off,

432. The money deposited by Hodgin as surviving

partner was kept under the same heading in

the bank's books, "Hodgin Bros. & Lunn,"

as before the death of Lunn, and was merely

Same—Deposits by Surviving Partner—Presumptions.

a continuation of the old line of deposits.

This would have been equally true if the deposits,

after the death of Lunn, had been made in the name of

"Hodgin, surviving partner." In either event, the de-

posits were in behalf of the firm, and were in the same

right as the note held by the bank against said firm;

and on the insolvency of the firm the bank had the

right to apply the deposit made by the surviving part-

ner in behalf of the firm to the indebtedness of the firm,

whether matured or not. If the surviving partner had

made the deposit a special deposit or, if there had been

an agreement with the bank that these deposits should

not be applied to the indebtedness of the firm to the

bank, then the bank's right of set-off would have been

tolled. Morse, Banks, § 325. But there was no evi-

dence to that effect. It is true that deposits made by an

executor or administrator in a bank cannot be applied to

Hodgin v. People's Nat. Bank

the indebtedness to the bank of the deceased. *Jordan v. Bank*, 74 N. Y. 467; *Appeal of Farmers' & Mechanics' Bank*, 48 Pa. St. 57. But that is because the personal representative holds the funds of the estate for the payment of the debts in the order prescribed by statute, and then *pro rata* in each class, which would be disturbed if the bank could apply the funds deposited by the executor or administrator to the indebtedness due to it by the deceased, though the deposits at the death of the testator could be applied to any indebtedness of his then due. *Jordan v. Bank*, *supra*. It is otherwise as to the surviving partner who merely continues the business for the purpose of winding it up, and of whom the law does not require the application of the funds in his hands to the debts in any prescribed order. The bank had no right, however, to apply the deposits on behalf of the firm, whether made during its existence or by the surviving partner, to the indebtedness held by it against one of the partners, and it could make no difference that this was the note of one partner indorsed by the other. It was an individual indebtedness, and partnership deposits could not be applied to it. A partnership is not liable for the debts of its members. *Strauss v. Frederick*, 91 N. C. 121. Though each partner (except in limited partnerships) is severally responsible for the entire indebtedness of the firm, yet, notwithstanding that fact, the individual deposits of a partner cannot be applied to the indebtedness of the firm to the bank. *Adams v. Bank*, 113 N. C. 332, 18 S. E. 513, and 23 Lawy. Rep. Ann. 111, and notes; *Bank v. Jones*, 119 Ill. 407, 9 N. E. 885; *Raymond v. Palmer*, 41 La. Ann. 425, 6 South. 692; *Dawson v. Bank*, 5 Ark. 283. Upon the issues as found, the judgment might have been corrected to accord with the above opinion but for the finding upon the eighth issue. The plaintiff is entitled to recover the excess of the deposits above the indebtedness of the firm, with interest from date of demand. New trial.

Same—Partner's
Individual Debts.

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FURCHES, J. (dissenting). The firm of Hodgin Bros. & Lunn was composed of the plaintiff, G. D. Hodgin, and L. L. Lunn. This firm was indebted to the defendant bank. Lunn died, and the plaintiff became the sole surviving partner of the firm of Hodgin Bros. & Lunn. After the death of Lunn, the plaintiff commenced collecting in the debts due the firm, and, not knowing what to do with the money, went to the president of the defendant bank, stated the fact that he wanted the president to advise him in the matter, when the president advised him to collect the assets as fast as he could, and pay the debts of the firm. The plaintiff then replied, "The firm is owing you, and I want to deposit the assets with you, that you may see that it is properly applied." Thereupon the plaintiff made his deposits in the defendant bank, and they were entered as deposits of Hodgin Bros. & Lunn. Besides the debt due the defendant by the firm of Hodgin Bros. & Lunn, the deceased partner, Lunn, owed the bank an individual debt of \$650, with plaintiff, Hodgin, as his surety. Plaintiff continued to make deposits in the defendant bank as he collected the assets of the firm until he had about the sum of \$4,000 on deposit with the defendant. But about the 1st of April, 1897, it became known that the firm of Hodgin Bros. & Lunn was insolvent, and that Lunn's estate was insolvent, and that the plaintiff, Hodgin, was also insolvent. Upon the defendant's receiving information of the insolvency of the firm, of the estate of Lunn, and of Hodgin, it applied a sufficient amount of the money so deposited with it by defendant to pay the debt against the firm, and also the note of \$650 of Lunn, to which the plaintiff, Hodgin, was surety, amounting in all to more than \$3,000. The question is, could the defendant do this? The partnership was dissolved, by the death of Lunn, on the 16th of March, 1896, and plaintiff became the only surviving partner,—became the legal owner of all the partnership assets. Bates, Partn. § 713. Hence his powers to dispose of the partnership assets in payment of debts and settling up the concern is derived

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from his title to the property, and not from his powers. *Id.* After a dissolution by death, the surviving partner is the legal owner in trust for the purpose of winding up the concern, payment of debts, etc. *Id.* § 720. This being so, the plaintiff was the owner of the money he deposited with the defendant, and the bank became his debtor, and he the bank's creditor, to the amount deposited. The fact that the deposits were made in the name of the firm of Hodgin Bros. & Lunn made no difference, as the firm was dissolved by the death of Lunn; and the defendant knew this, and knew that plaintiff was making the deposits as the surviving partner. Morse, Banking, § 326. The right of "lien, set-off, and application only exists where the individual who is both depositor and debtor stands in both these characters in precisely the same relation and on precisely the same footing towards the bank." *Id.* It seems to us that the principles enunciated by these authorities, if applied to this case, decide it against the defendant's right to apply the deposits to the satisfaction of the debt due by the firm of Hodgin Bros. & Lunn. The parties owing the debt and the party making the deposits are not the same. The debt due to the bank is the debt of Hodgin Bros. & Lunn. The deposits made by the plaintiff were funds that belonged to him. It is true that they belonged to him as trustee, but the defendant cannot be allowed to interfere with his rights as trustee against his will, unless it has a specific lien upon these deposits; and it seems to us that we have shown that it has no such lien. The same principle is involved in this case as that of an executor or administrator who deposits in a bank to which his intestate or testator was indebted. The bank cannot make an application of such deposits to the satisfaction of the debts due by the intestate or testator. Jordan v. Bank, 74 N. Y. 467: Appeal of Farmers' & Mechanics' Bank, 48 Pa. St. 57. It is true that it is contended that the reason of this is that it is the duty of the personal representative to pay the debts of the deceased *pro rata*. And there is that difference, but we do not

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think that is the controlling reason. This seems to have been so before the statute requiring the debts to be paid *pro rata*, and was so when he had a right to prefer creditors of equal degree. The true ground is the one we have stated,—the want of mutuality in debtor and creditor. It seems to be clear that the bank had no right to apply these deposits to the satisfaction of the note of Lunn for \$650. A partnership is not liable for the debts of its individual members (*Strauss v. Frederick*, 91 N. C. 121), and, if the deposits had been made by the firm, they could not have been applied by the defendant to the satisfaction of the individual debts of one partner.

DOUGLAS, J. I concur in the dissenting opinion.

RICHARDSON

v.

DENEGRE *et al.*

(*Circuit Court of Appeals, Fifth Circuit, March 14, 1899.*)

Checks Received for Collection, and Credited When Insolvent—Right to Reclaim.*—Checks were sent to a bank by depositors for the purpose of having them collected, and the proceeds placed to their credit; and they were received and placed to their credit when the bank officers knew that it was insolvent, and when the depositors were not indebted to the bank. *Held*, that the action of the bank in so receiving the checks at such time was such a fraud upon the depositors as gave them the right to recover the checks from the bank's receiver.

APPEAL by defendant from the Circuit Court of the United States for the Eastern District of Louisiana.
Affirmed.

The case made by the pleadings and sustained by the testimony is as follows: On August 5, 1896, the appellees, regular depositors in the American Na-

*See note at end of case.

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tional Bank at New Orleans, deposited therein, a few minutes after the bank closed at 3 o'clock p. m., the following checks:

"No. 8,935. New Orleans, July 30, 1896.

"New Orleans National Bank, pay to the order of J. P. Blair, Esq., forty-one and 66-100 dollars.

R. E. Craig, Vice President.

"Fergus G. Lee, Secretary.

"\$41.66."

On end: "Sun Mutual Ins. Co., 52 Camp St."

Indorsed: "Pay Denegre, Blair & Denegre. J. P. Blair.

"Pay to American National Bank for collection and deposit. Denegre, Blair & Denegre."

"No. 655. Citizens' National Bank of Louisiana,
New Orleans, August 5, 1896.

"Pay to the order of Mess. Denegre, Blair & Denegre, Attys., twenty-one hundred and twenty-two 72-100 dollars. Chas. J. Theard."

Indorsed: "For deposit. Denegre, Blair & Denegre, Southern Pacific Company, Atlantic System."

"New Orleans, August 5, 1896.

"Pay to the order of J. P. Blair five hundred dollars.

"Jno. B. Richardson, Local Treasurer.

"To the Citizens' Bank, New Orleans.

"\$500.00."

Indorsed: "Pay to Denegre, Blair & Denegre. J. P. Blair.

"Pay to American National Bank for collection and deposit. Denegre, Blair & Denegre.

These deposits were made in the usual course of business, for the purpose of having the checks collected, and the proceeds placed to their credit. At the time the deposits were made, while credit was given upon the bank book of appellees, the checks themselves were set aside like all other deposits received that day, and kept separate and apart from the funds of the bank, until after the meeting of the directors in the evening, at which meeting the said separation of

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that day's deposits was affirmed and ratified. Appellees were not indebted to the bank, but had over \$2,000 to their credit on deposit. The bank never opened its doors again for business after the receipt of the said checks, but was taken charge of by the bank examiners, and subsequently placed in the hands of a receiver, the appellant herein. For a long time the bank had been in such a condition of insolvency as must have been known to its managing officers. The appellees subsequently stopped payment of the checks, and they were never collected, and are still in the hands of the bank's receiver. Demand was made for their return, which was refused. The present suit was brought to recover possession of said checks in the court below, which gave judgment for the complainants, and perpetually enjoined Frank L. Richardson, as receiver, from making any other disposition of the said checks than to return the same to complainants; from which judgment said receiver appealed, and assigned said ruling as error, and contended: (1) The court erred in rendering a decree in favor of complainants; (2) in not holding that the relations of the complainants to the bank, as a depositor of checks in controversy, was that of debtor and creditor; (3) in holding that the check for \$2,122.76 drawn by Charles Theard, and then indorsed "For deposit," did not vest in said bank; and (4) that the court erred in holding that it appeared from the evidence that the bank was hopelessly insolvent, to the knowledge of its officers, at the time of the deposit of the checks in controversy.

Chas. S. Rice, for appellant.

E. B. Kruttschnitt, for appellees.

Before PARDEE and McCORMICK, Circuit Judges, and SWAYNE, District Judge.

SWAYNE, District Judge (after stating the facts as above). While it is well established that the checks of depositors, in the ordinary course of business with the bank, do not become the property of the bank, and the relation of debtor and creditor is not established, but

Note

that of principal and agent prevails up to the time the check is collected, and money is received by the bank, yet we think the decision of this case need not rest upon that well-established proposition of law. It is true that the late president of that bank vigorously denied that he had any knowledge of the insolvency of the bank before the night in question. It is plainly evident, not only from the conditions which the bank has since been shown to have been in,—conditions which he could not avoid knowing,—but also from the records of the president and cashier, of which this court has taken judicial notice, he could not have been telling the truth. His action setting these checks and other deposits of the 5th of August aside, failing to mingle them with the moneys of the bank, is strong proof that he was aware that the bank was hopelessly insolvent. The testimony of the bank examiners shows that the bank had been hopelessly insolvent for months. The officers were where they could have known, they should have known, and must have known its actual condition. Of this insolvency, however, it is evident that the appellees had no knowledge or intimation, for they not only allowed their large deposit to remain in the bank, but sent that which is in controversy here, which they would not have done if they had had the slightest intimation that the bank was in trouble. The action of the bank in thus receiving said checks for collection was such a fraud upon the appellees as gave them the right to demand the return of the checks. We do not feel called upon to cite any authorities to establish the doctrine that the checks received under such circumstances did not become the property of the bank, but remained that of depositors, who have, under the circumstances, the right to recover the same; and the judgment of the lower court is therefore affirmed.

NOTE.

Banks—Insolvency—Rights of Depositor.—Where the officers of a bank know that it is hopelessly insolvent, the title to deposits made thereafter remains in the depositors, and they may recover the

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amount thereof in full. *Wasson v. Hawkins*, 59 Fed. Rep. 233. *Somerville v. Beal*, 49 Fed. Rep. 790; *Meridian First Nat. Bank v. Strauss*, 66 Miss. 479, 14 Am. St. Rep. 579; *Martin v. Webb*, 110 U. S. 7; *New York Brew. Co. v. Higgins*, 79 Hun (N. Y.) 250; *St. Louis, etc., R. Co. v. Johnston*, 133 U. S. 566; *Parker v. Crawford*, 3 Tex. App. Civ. Cas. § 365; *American Trust, etc., Bank v. Gueder, etc., Mfg. Co.*, 150 Ill. 336; *Patts et al. v. Schmucker (Md.)*, 6 Am. & Eng. Corp. Cas., N. S., 37.

At common law one who deposits money in an insolvent bank, believing it to be solvent, and thereby loses his money, has no cause of action against the directors, unless the deposit was induced by their fraudulent conduct. *Minton v. Stahlman (Tenn.)* 34 S. W. Rep. 222. Compare *Showalter v. Cox (Tenn.)*, 37 S. W. Rep. 286; *Friberg v. Cox (Tenn.)*, 37 S. W. Rep. 283.

ELDER

v.

FRANKLIN NAT. BANK OF CITY OF NEW YORK.

(*Supreme Court of New York, Appellate Term, Jan. 23, 1899.*)

Checks—Failure to Stop Payment.—Where a bank, through an oversight, pays a check drawn by a depositor to the order of a third party, after it has received an order from the depositor, not to honor the check, the bank is liable to its depositor for the amount thereof, although there was an agreement between the bank and the depositor to the effect that the bank would not be liable for failure to obey such orders, but would merely endeavor to execute them.

APPEAL by defendant from borough of Manhattan, municipal court, First district. *Affirmed.*

Argued before BEEKMAN, P. J., and GILDERSLEEVE and GIEGERICH, JJ.

Jonathan C. Ross, for appellant.

Nathan Ottinger, for respondent.

BEEKMAN, P. J. The plaintiff had an account with the defendant. On the 3d day of March, 1898, he drew against the account a check, dated March 8, 1898, for the sum of \$40, to the order of the Adek Manufacturing Company. On March 5th he sent a notice in writing to the defendant not to pay it. This notice was duly

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received, and, in accordance therewith and pursuant to the practice of the defendant in such cases, an entry of the receipt of such notice was made by the paying teller of the bank in a book which was kept for the purpose, and a similar entry was also made by the book-keeper in his ledger against Elder's account. Notwithstanding this, when the check in question came in through the clearing house, it was paid, through an oversight, as the bank officials testify, and this action was brought for the purpose of recovering the amount.

The only defense interposed by the defendant bank, which calls for consideration on our part, is that by express agreement with the plaintiff, made before the check in question was drawn, it was exempted from any liability whatsoever in such a case. The agreement thus set forth, with other matters not material to the question here presented, was printed upon the inside of the cover of plaintiff's pass book, and reads as follows :

"It is further agreed that the bank shall not be responsible for the execution of an order to stop payment of a check previously drawn ; that the bank will endeavor to execute such orders, but that no liability shall be created by failure so to do ; and that no rule, usage, or custom shall be construed to create such liability."

It appears that the pass book in question was substituted for a previous one, which the plaintiff had received when he originally became a depositor in the bank, and which did not contain any such stipulation. The plaintiff testifies that he did not read the alleged agreement, and was not aware of what it contained at the time the check in question was drawn. The counsel for the defendant claims that there is evidence in the case tending to show the contrary, but it is unnecessary for us to pass upon this question, which is one of fact, and which, it must be assumed, the trial justice determined in favor of the plaintiff. But, even assuming that the fact had been otherwise found, we are still of the opinion that, under the circumstances,

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the defendant was not relieved by the agreement from the consequences of its negligent act. Undoubtedly, in the absence of any agreement, the bank was bound to respect the notice which it had received, and for a failure to observe the directions of its depositor in that regard it would have been clearly liable. The check was a mere order upon the bank to pay from the depositor's account according to the instructions in that respect contained therein, and was subject to revocation by the drawer at any time before it was paid; and, if the bank should pay after notice of such revocation, it would be held to have paid out its own funds, and could not, therefore, charge its depositor with the amount, but must bear the loss itself. The agreement in question is, therefore, one which is in derogation of the common law in such cases, and, being framed by the defendant itself for its own benefit, must be strictly construed.

It will be observed that such agreement does not declare unconditionally that for the failure to observe a stop order the bank shall not be liable, but it invites the assent of its depositors to the engagement by agreeing that it will endeavor to execute such orders. This is a most important qualification, and was doubtless inserted as an assurance to them that the bank would still exercise some care in the matter. Indeed, it can scarcely be credited that any bank could obtain depositors on any account under an agreement that under no circumstances should it be responsible for a failure to observe their directions with respect to the stoppage of checks. The defendant, it will be observed, did not refuse to receive any such notices. Indeed, the evidence in the case shows that it not only recognized the right of its depositors in that regard, but also provided a method of registering such notices or orders, so as to assure the proper observance of them by its clerks, thus acknowledging the obligation which it had assumed to "endeavor to execute such orders." Upon a proper construction of the language used in the agreement, we are of the opinion

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that its fair import was that the defendant should not be liable, if in good faith it paid the check that had been stopped, unless it failed properly to fulfill its agreement to endeavor to comply with the depositor's direction. In other words, the promise to make such endeavor necessarily imported the exercise by the bank of at least ordinary care in so doing. Any other construction than this would not only render the engagement meaningless, but also most injuriously misleading to depositors.

The agreement, then, is to be construed as if it read as follows (the words inserted by us being italicized):

"It is further agreed that the bank shall not be responsible for the execution of an order to stop payment of a check previously drawn; that the bank will endeavor to execute such orders, but that no liability shall be created by failure so to do, *where the bank has exercised ordinary care in that regard*; and that no rule, usage, or custom shall be construed to create such liability."

The courts are not prone to construe instruments in such a way as to support a waiver of liability for negligence. Appleby v. Bank, 62 N. Y. 12; Allen v. Bank, 69 N. Y. 314; Mynard v. Railroad Co., 71 N. Y. 180.

The first two cases above cited bear upon the liability of a savings bank for the payment of money to the wrong person. In the first case the by-law of the bank read:

"Although the bank will endeavor to prevent fraud upon its depositors, yet all payments to persons producing the pass books issued by the bank shall be valid payment to discharge the bank."

In commenting upon the rule, CHURCH, C. J., giving the opinion of the court, says (page 17):

"But these rules do not dispense with the exercise of ordinary care on the part of the officers of the bank. If, by a regulation designed to prevent fraud upon depositors, which by the rules the bank promised to 'endeavor' to do, a fact or circumstance is brought to the knowledge of the officers, which is calculated to,

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and ought to, excite the suspicion and inquiry of an ordinarily careful person, it is clearly the duty of the officers to institute such inquiry, and a failure to do so is negligence, for which the bank would be liable; and such, I understand, is the doctrine of the cases cited by the defendant. 'The officers of these institutions are held to the exercise of reasonable care and diligence.'

The second case above cited is substantially to the same effect.

The third case is one against a common carrier, where the latter claimed exemption from liability for its negligence under an agreement, contained in the contract of shipment, to "release and discharge the said company from all claims, demands, and liabilities, of every kind and character whatsoever, for or on account of, or connected with, any damage or injury to, or the loss of, said stock, or any portion thereof, from whatsoever cause arising." It was there held that while, taken literally, the language would include a loss from negligence, it would not be so construed; the court saying (page 183):

"Every presumption is against an intention to contract for immunity for not exercising ordinary diligence in the transaction of any business, and hence the general rule is that contracts will not be so construed, unless expressed in unequivocal terms."

It will be noticed that the court rests the principle of its decision, not upon law which is peculiar to common carriers, but upon a rule applicable to all contracts.

We are clearly of the opinion that the construction which we have given to the agreement in question is sustained by both reason and authority, and, as the record discloses evidence enough to support the finding of the trial justice that the defendant had been negligent, it follows that the judgment must be affirmed.

Judgment affirmed, with costs. All concur.

Rice v. Citizens' Nat. Bank

RICE *et al.*

v.

CITIZENS' NAT. BANK.

(*Court of Appeals of Kentucky, June 2, 1899.*)

Payment of Check on Forged Indorsement.*—The payment by a bank of a check to any person save the payee himself, unless it be payable to bearer, is a payment at its peril; and if the indorsement is forged, it is a payment out of the bank's funds, and the depositor cannot be charged therewith.

Relation of Bank to Depositor.—A bank receiving a deposit with instructions to honor the checks of a certain person to certain parties does not thereby become the agent of the depositor, but merely his debtor.

APPEAL by plaintiff from Garrard county circuit court. *Reversed.*

D. B. Baker, for appellants.

Wm. M. Johnston and *R. P. Jacobs*, for appellee.

WHITE, J. In October, 1896, appellants wrote to appellee as follows: "Louisville, Ky., Oct. 10, 1896.

Case Stated. Mr. B. F. Hudson, Cashier, Lancaster,

Ky.—Dear Sir: We have your letter of yesterday in answer to ours in regard to the standing of certain parties, which is explicit and satisfactory, and would have been glad if you had written us so plainly in your first letter. We thank you, however, very much for the pains you have taken in answering our last letter. We now inclose you check for seven hundred dollars, for which you will please honor Mr. M. W. Johnson's checks to the following parties, and for the following amounts. He writes us that he gave parties checks payable at your bank on Monday, the 12th, P. A. Spainhour, \$100; J. K. Royce, \$150; J. T. Dawson, \$100; Isaiah S. Conley, \$150; A. J. Bennett, \$150; Willis Turner,

*See note at end of case.

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\$50,—as M. Johnson has forwarded to us notes of the above parties as stated, and writes that he had given checks on your bank for the above amounts. Yours, truly, Rice & Givens." On the receipt of this check the \$700 was placed to the credit of Johnson. Afterwards the several checks drawn by Johnson to these named parties were presented by Johnson with the parties' names indorsed on the back of each, and the money was paid by the appellee to Johnson on the statement that he had been requested by these parties to draw the money for them, and bring it to them, as they were busy at work. It finally developed that the checks drawn by Johnson were never indorsed by or delivered to these parties, and that they had never signed the notes sent by Johnson to appellants. Johnson himself had signed each one of the notes as surety. The signatures of the principals were forgeries. This action was brought by the appellants to collect from appellee the deposit of \$700 upon the allegation that that sum had been deposited with appellee, and had not been paid to them, or upon their order. The defense presented is the letter and the payment, as above, to Johnson. It is clearly shown by the parties that they were ignorant of the signature of their names to the notes or indorsement of the checks, and that those signatures were forgeries. Johnson is dead. The law and facts were submitted to the court, and judgment was rendered for appellee bank, and, after reasons and motion for new trial had been overruled, this appeal is prosecuted.

The court found as facts that the only authority the appellee had to pay the checks of Johnson was the letter above; that the checks were presented by Johnson and paid to him by appellee; that at the time of presentation they were indorsed by the proper signatures, but that the signatures were not written by the several parties to whom the checks were payable, or with their knowledge or consent, and was never authorized or ratified by either of them, and that neither of said payees ever received any of the proceeds

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of said checks. In short, the court found that the checks were drawn by Johnson for the proper sums as the letter of instruction directed, and the checks were presented and paid by the bank on forged indorsements, and that the parties to whom the bank was authorized to pay the \$700 on checks never received any part thereof. The court then concluded, as a matter of law, that the bank was not liable, and again, that it had a remedy in the notes signed by Johnson as surety of these various persons, and until that remedy was exhausted it could not hold the bank liable. A deposit in bank of an ordinary deposit creates the relation of debtor and creditor. If the deposit

Payment of Check
on Forged
Indorsement.

be for a special purpose, under instructions, these instructions must be complied with by the bank. There may be a special deposit, so as to create a bailment, but that can have no application here. It is immaterial whether this deposit of \$700 be treated as a general deposit or as a deposit for a special purpose other than bailment. The money was paid out precisely as the special instructions with the deposit provided, except that the signatures of the payees of the checks were forged. The principle seems to be well settled that a payment by a bank of a check to any person save the payee himself, except it be payable to bearer, is a payment at its peril. If the signature of indorsement is genuine, it is a payment out of the depositor's funds; if it is forged, it is a payment out of the bank's funds, and the depositor cannot be charged with it. *Shipman v. Bank* (N. Y. App.) 27 N. E. 371; *Hatton v. Holmes* (Cal.) 31 Pac. 1131; *Bank v. Whitman*, 94 U. S. 347; *Bank v. Morgan*, 117 U. S. 112, 6 Sup. Ct. 657; *Bank v. Burke* (Ga.) 7 S. E. 739, and many other cases. We are of opinion that under the facts found by the court his conclusions of law are error. We conclude that the bank is liable to appellants for this deposit. The payment on a forged check was a payment by appellee at its peril. It was not a payment of appellants' funds, however great the care used by the appellee. It is not

Winchester Bank *v.* Clark County Nat. Bank

a question of care or negligence. The payment was not to the payee of checks, but a payment upon what purported to be his order. The order (indorsement on the check) was a forgery. For this payment appellants are in no way liable. There was no relation of principal and agent between the appellants and appellee. It was pure debtor and creditor. Wherefore, for the reasons indicated, the judgment is reversed, and cause remanded for a new trial, and for proceedings consistent herewith.

Relation of Bank to Depositor.

NOTE.

Checks—Forged Indorsements—Depositor's Liability.—A depositor cannot be held liable for money paid on a forged indorsement of his check, if he has not been negligent. *Shipman v. State Bank*, 126, N. Y. 318, 22 Am. St. Rep. 821; *Jackson v. National Bank*, 92 Tenn. 154, 36 Am. St. Rep. 81; *Chicago First Nat. Bank v. Northwestern Nat. Bank*, 152 Ill. 296, 43 Am. St. Rep. 247; *Pickle v. Muse*, 88 Tenn. 390, 17 Am. St. Rep. 900; *Bristol Knife Co. v. Hartford First Nat. Bank*, 41 Conn. 421, 19 Am. Rep. 517; *Belknap v. Nat. Bank of N. A.*, 100 Mass. 376, 97 Am. Dec. 105; *Hatton v. Holmes*, 97 Cal. 208; *Brixen v. Deseret Nat. Bank*, 5 Utah 504; *Washington First Nat. Bank v. Whitman*, 94 U. S. 343; *United States v. Nat. Exch. Bank*, 45 Fed. Rep. 163; *Thomson v. Bank of British North America*, 82 N. Y. 1; *Williams v. Drexel*, 14 Md. 566; *Millard v. Nat. Bank of Republic*, 3 MacA. (D. C.) 54; *Citizens' Nat. Bank v. Importers', etc., Bank*, 119 N. Y. 195; *Morgan v. State Bank*, 11 N. Y. 404; *Breeman v. Duck*, 11 M. & W. 251, *Robinson v. Tucker*, 16 Q. B. 560, 71 E. C. L. 760; *Mead v. Young*, 4 T. R. 28.

WINCHESTER BANK

21.

CLARK COUNTY NAT. BANK.

(*Court of Appeals of Kentucky, May 27, 1899.*)

Checks—Attachment Liens—Priority.*—A check drawn prior to, but presented subsequent to the service of an attachment upon the bank as garnishee, is, to the amount for which it is drawn, an appropriation of any funds in the bank to the credit of the drawer at its presentation, regardless of the attachment lien.

*See note at end of case.

Winchester Bank v. Clark County Nat. Bank

APPEAL by plaintiff from Clark county circuit court.
Reversed.

J. W. Benton, for appellant.
Beckner & Jouett, for appellee.

WHITE, J. On February 10, 1897, the appellant, Winchester Bank, sued out an attachment against I. C. Skinner, claiming \$315.37, and had appellee served as garnishee. At that time appellee had on deposit the sum of \$671.39 to the credit of I. C. Skinner. On the same day the attachment was served, but afterwards, a check for \$393.95, drawn February 8th, by I. C. Skinner, in favor of C. C. Skinner, was presented by appellant as the agent of C. C. Skinner; but, there being but \$356.02 on deposit, after keeping back the \$315.37 under the attachment, the C. C. Skinner check was refused payment. After the execution of the order of attachment, the appellee paid out on checks of I. C. Skinner the balance above the amount of the attachment. The C. C. Skinner check was returned as uncollectible and protested. In May, 1897, the appellee filed its answer as garnishee, admitting that at the date of the attachment it had to the credit of I. C. Skinner the sum of \$671.39, and then held subject to the order of the court \$315.37. C. C. Skinner filed a petition, asked to be made a party, and claimed the fund attached, alleging that the appellant sued out its order of attachment after it received his check for collection, and before it presented it for payment, and that his check was drawn February 8, 1897,—two days before the attachment was sued out. Without answering or denying the allegations of the petition of C. C. Skinner, appellant filed an amended petition, seeking to hold appellee liable for the difference between the deposit, \$671.39, and the C. C. Skinner check of \$393.95, by reason of the facts, as alleged, that this sum was paid out with knowledge of the existence of the C. C. Skinner check, and after the service of the attachment. To this amended petition the court sustained a demurrer, and directed appellee to pay to C. C. Skinner the

Note

sum of \$315.37 attached. Appellant failing to plead further, its action as to appellee garnishee was dismissed, and from that order it appeals.

It appears from the amended petition that on the 10th day of February appellee had on deposit \$671.39, and received notice by the check to C. C. Skinner of an appropriation of \$393.95, and by the attachment of a lien for \$315.37. There were not enough of funds to pay these two liens, yet after that day appellee paid on other checks drawn by I. C. Skinner subsequent in date to the one for \$393.95, as well as the date of the attachment, the sum of \$356.02. Taking this statement to be true, as it must on demurrer, we are of opinion that the appellee garnishee is liable for the balance on deposit, after paying the check for \$393.95 in full. It is clear that this check drawn on the 8th was an appropriation of any funds on hand at its presentation that remained to the credit of I. C. Skinner, and this regardless of the attachment lien of appellant. Appellee could have paid the \$393.95 check in full on presentation on the 10th, or, if it deemed this course unsafe, it could have refused to pay to any person the \$671.39 till the equitable liens were settled. In utter disregard of the \$393.95 check, which appellee refused to pay because of the attachment, it paid out the balance on deposit, saving only the amount fixed by the attachment. The demurrer to the amended petition should have been overruled. For this error the judgment is reversed, and cause remanded for proceedings consistent herewith.

NOTE.

Attachments—Priority.—A subsequent attachment will not take precedence of a lien or incumbrance on a sale, or conveyance of the attached property which is valid and antedates such attachment. *Walker v. Houston* (Tex.), 29 S. W. Rep. 1139.

Stuart v. Bank of Staplehurst

STUART

v.

BANK OF STAPLEHURST.

(*Supreme Court of Nebraska, Feb. 9, 1899.*)

Application for Removal to Federal Court—Jurisdiction.—In an action in a state court wherein a removal to a United States court is sought under the provisions of section 2 of the act of congress of March 3, 1887, as corrected in 1888 (see 25 Stat. 433), and it appears from the face of the record that the suit is not a removable one, the application does not deprive the state court of its jurisdiction.

Same—Same.—The better practice in such a case is, upon a proper application in the state court for removal to the federal court, for the state court to suspend proceedings in the suit, and await the action of the federal tribunal on a motion to remand, but its action during the interim may be of force and valid.

National Banks—False Statements—Liability of Directors—Remedies.*—Directors of a national bank who, in simulated performance of the duties prescribed by the law applicable to such an institution, relative to the preparation and publications of advertisements, statements, and reports, knowingly make and publish false statements and reports of the financial condition of the bank, with intent to deceive, and such matters are believed and acted upon by parties, to their damage, are liable for the damages, in an action for the deceit.

Same—Same—Same—Same.—The liabilities which are fixed in the national banking law for violation of its provisions are not exclusive, and do not preclude the action for deceit.

Same—Same—Pleading.—The petition in the case at bar *held* to state a cause of action for deceit, and not for relief under the national banking law, and to present no federal question for adjudication.

Same—Same.—The statements and reports which are required and are made to the comptroller, and published in the newspapers, have among their purposes that of conveyance of information to those persons, each or all, who contemplate dealings with the bank in which its financial condition enters as a vital matter.

Parties—Misjoinder.—A petition in an action for a tort which joins several parties as defendants, if it states a joint act, and relative to a tort, which may from its nature be joint or committed by persons in combination, is not open to attack by demurrer on the ground of misjoinder of parties defendant.

Questions for Review.—Questions of which there is no assignment in the petition in error will not be considered on review.

(Syllabus by the Court.)

*See notes at end of case.

Stuart v. Bank of Staplehurst

ERROR by defendant to Seward county district court.
Affirmed.

C. C. Flansburg, for plaintiff in error.

Geo. W. Lowley, Pound & Burr, and *Biggs & Thomas*, for defendant in error.

HARRISON, C. J. The defendant in error instituted this action in the district court of Seward county, and alleged for cause that the plaintiff in error and parties who were co-defendants were, at the times Case Stated. of the occurrences upon which the suit was predicated, directors of a national bank, in the business which its name indicates, in the city of Lincoln, and at various stated times made and published, or caused them to be published, in newspapers of general circulation in said city and in the state of Nebraska, certain false statements of fact of and concerning the bank of which they were directors, and its matters of business, and which related to its solvency and reliability; that such statements were made and published with a knowledge of their falsity, and with an intent to mislead and deceive the public and the defendant in error, and that the statements accomplished or served the purpose for which they were intended; that the defendant in error was thereby induced to deposit money to a large amount, stated in the petition, in the said bank, which was lost by reason of the insolvency and failure of the said bank. The commencement of the action was of date February 25, 1895. On March 29, 1895, the plaintiff in error and his co-defendant filed an application or petition for the removal of the cause to the United States circuit court for the district of Nebraska. Said petition was accompanied by the requisite bond. On April 1, 1895, there was filed in the state court, for the plaintiff in error and each of his co-defendants, a demurrer to the petition. These were on April 5, 1895, overruled, and the application for removal was denied.

There appears in the record the following, as setting forth what was done in the cause in the federal court:

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“And on the 14th day of October, 1895, the following order was made: This cause having been heard on the motion of the plaintiff to remand the same to the state district court in and for Seward county, Nebraska, from whence it came, Messrs. Pound & Burr and Biggs & Thomas appeared for the plaintiff, and Deweese & Hall, C. O. Whedon, and C. C. Flansburg for the defendants; whereupon, after careful consideration thereof, and being fully advised in the premises, it is now on this day considered, ordered, and adjudged by the court that said motion be, and the same is hereby, overruled, to which ruling and order by the court said plaintiff, by its attorneys, then and there duly excepted. And on the 8th day of May, 1896, the following further order was made in said cause, *i. e.*: This cause, coming on for hearing on the motion of the plaintiff to remand the same to the state district court in and for Seward county, Nebraska, from whence it came, was argued and submitted to the court by attorneys for the respective parties; whereupon, after careful consideration thereof, and being fully advised in the premises, it is now on this day ordered and adjudged by the court that said motion be, and the same is hereby, sustained, and said cause is remanded to the said district court in and for Seward county, Nebraska, from whence it came.”

May 6, 1895, answers were filed in the state court for all parties sued, except the plaintiff in error. July 9, 1895, and during the pendency of a term of the state court, a judgment by default was rendered therein against the plaintiff in error, and the case is presented for him to this court by error proceeding. The petition in error is as follows: “(1) The petition does not state facts sufficient to constitute a cause of action against this plaintiff and in favor of the defendant in error. (2) The court had no jurisdiction to render said judgment. (3) The court erred in overruling the demurrer of this plaintiff to said petition. (4) The court erred in exercising jurisdiction of said cause after the same was removed to the circuit court of the United States within and for the district of Nebraska. (5)

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The court erred in rendering a judgment by default against plaintiff in error while said cause was pending on removal proceedings in the circuit court of the United States. (6) The court erred in assuming to determine whether said cause was properly removed under the acts of congress, and assuming to withdraw said action from the proper circuit court of the United States."

It is first argued for plaintiff in error that the jurisdiction of the state court in the cause ceased as soon as the application for removal was filed; it could not further proceed therein; and its subsequent acts were void. In section 2 of the act of March 3, 1887, as corrected in 1888 (see 25 Stat. 433), amendatory of the act of 1875, it

Application for
Removal to
Federal Court—
Jurisdiction.

is provided: "That any suit of a civil nature, at law or in equity, arising under the constitution or laws of the United States, or treaties made, or which shall be made under their authority of which the circuit courts of the United States are given original jurisdiction by the preceding section, which may now be pending or which may hereafter be brought in any state court, may be removed by the defendant or defendants therein, to the circuit court of the United States for the proper district," etc. The act further provides that the application shall be by petition, accompanied by a bond, and the time when it shall be filed; and when it has been done, "it shall then be the duty of the state court to accept said petition and bond and proceed no further in such suit." 25 Stat. 435, § 3. If the case is a removable one, and the petition and bond are filed, the state court should, as stated in the portion of the statute we have quoted, proceed no further in the suit. It has no jurisdiction to do so, and it is probably better, in all cases where the petition for removal, accompanied by the bond, has been presented, especially if the right of removal is questionable or doubtful, to await in the state court the action of the United States court on the point of the removability of the suit. An examination of the authorities discloses much confusion and conflict on the

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subject now under discussion, but it may be said that if the cause for removal exists, and is disclosed by the record, if the application is made, if the proper papers are filed, the jurisdiction of the state court ceases without and despite any choice or act on its part. It may also be stated that if the cause is in fact not a removable one, and that it is not appears on the face of the record, or is disclosed by the papers, the case is not removed, and the state court does not lose, but retains, its jurisdiction, and action therein, even during the time a transcript is on file in the United States court, may be good, and ultimately prevail.

We have no doubt that in all cases the better course is to suspend proceedings in the state court until the court of removal has acted on the matter on a motion to

remand; but, as we have just stated, there may be cases wherein the records disclose their non-removable character, and in any such the state court retains jurisdiction, notwithstanding the removal proceedings. Dill. Rem. Causes (5th Ed.) § 143; *Tennessee v. Union & Planters' Bank*, 152 U. S. 454, 14 Sup. Ct. 654; *Walker v. Collins*, 167 U. S. 57, 17 Sup. Ct. 738; *Chappell v. Waterworth*, 155 U. S. 102, 15 Sup. Ct. 34; *Blair v. Manufacturing Co.*, 7 Neb. 146, and cases cited; *Water Co. v. Keyes*, 96 U. S. 199; *Railway Co. v. Dunn*, 122 U. S. 513, 7 Sup. Ct. 1262; *Stone v. South Carolina*, 117 U. S. 430, 6 Sup. Ct. 799; *Carson v. Hyatt*, 118 U. S. 279, 6 Sup. Ct. 1050. An examination of the petition herein convinces us that it did not declare on any cause of action conferred by statute or United States law. It was not to enforce a liability arising solely by reason of the violation of any provision of the national banking law. There was in the petition a direct statement of an action for false representations, or, more properly and generally stated, for deceit. Some of the acts declared upon may have been violations of the national banking act, but they were not relied upon as such, nor was a remedy sought under said act. The petition for removal did not, in its statements of facts, present any stronger reason or cause for removal than was disclosed by the

Name—Same.

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original petition in the action. There were some conclusions averred in it, but these did not strengthen it beyond its statements of facts.

The acts which constitute the basis for an action similar to the one at bar may be within or without the duties of officers or directors of a national bank, and they may be violative or not of the duties of the parties sued, as directors of a national bank, and the acts may furnish cause for a common-law action of deceit. Prescott v. Haughey, 65 Fed. 653; Gerner v. Thompson, 74 Fed. 125; Bank v. Thoms, 28 Wkly. Law Bul. 164; Bartholomew v. Bentley, 15 Ohio, 660; Mor. Priv. Corp. § 573. And any action which might accrue by reason of the same acts under the national banking law would not be exclusive of another action and would not exclude the one of deceit. Prescott v. Haughey, *supra*. It seems clear that the record disclosed on its face that the case was not one which could be removed, and that the state court did not lose its jurisdiction.

National Banks—
False Statements—
Liability of Di-
rectors—Remedies.

Same—Same—
Same—Same.

Same—Same—
Pleading.

Another point of argument is that, in an action of deceit, it must appear that the representations alleged in the complaint were made directly to the complainant. We do not think this is tenable. The representations being made for the whole or any of the public, if seen, and relied and acted upon, by any person, and damages result, the right of action arises. Bank v. Thoms, *supra*; Prewitt v. Trimble, 92 Ky. 176, 17 S. W. 356; Tate v. Bates, 118 N. C. 287, 24 S. E. 482; Graves v. Bank, 10 Bush, 23; Seale v. Baker, 70 Tex. 283, 7 S. W. 742; Peek v. Gurney, 8 Moak, Eng. R. 1; Westervelt v. Demarest, 46 N. J. Law 37.

Same—Same.

It is also contended that the petition was defective in its joinder of the parties defendant in an action of deceit. The petition charged joint actions of the defendants, and the acts were such as might be done in combination; hence it was not open to attack by demurrer for an improper joinder of parties. Pom. Rem. & Rem. Rights, §§ 281,

Parties—Mis-
joinder.

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307; Stiles v. White, 11 Metc. (Mass.) 356; White v. Sawyer, 16 Gray, 586; Machine Co. v. Keifer, 134 Ill. 481, 25 N. E. 799; Railroad Co. v. Ross, 142 Ill. 9, 31 N. E. 412; City of Chicago v. Babcock, 143 Ill. 358, 32 N. E. 271. This disposes of all the questions argued which were raised by the assignments in the petition in error. There was another point presented, but it was not assigned for error in the petition, hence need not be considered. Post v. Olmsted, 47 Neb. 893, 66 N. W. 828. It follows that the judgment of the district court will be affirmed. Affirmed.

Questions for
Review.

NOTES.

National Banks—Action against Directors for False Reports.—A private individual may maintain a common-law action in the nature of an action of deceit against the directors of a national bank for damages caused by the making of false reports in contravention of the national banking act. Gerner v. Thompson (C. C.), 74 Fed. Rep. 125. The liability of the directors to such an action is not precluded by the liability imposed by the act. Prescott v. Haughey (C. C.), 65 Fed. Rep. 653.

Same—Same—Jurisdiction.—In Bailey v. Mosher, 74 Fed. Rep. 15, it was held that an action brought against the directors of a national bank, for damages for loss through the insolvency of the bank of money loaned it upon false representations contained in a report of the directors made in accordance with the statutes and the rules of the comptroller of currency, did not arise under the federal constitution or statutes, and was not under the jurisdiction of the federal courts originally, nor by removal, being between citizens of the same state.

COOPER *et al.*

v.

HILL.

(Circuit Court of Appeals, Eighth Circuit, May 9, 1899.)

National Banks—Power to Repair Property for Sale.—Where a national bank has lawfully acquired property, it may, in order to sell it, make reasonable repairs upon it.

Same—Ultra Vires.—It is *ultra vires* of a national bank to expend its money in prospecting for ore on its property.

Same—Same—Liability of Directors.—The directors of a national

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bank become personally liable to the bank, or its receiver, for losses caused by their use of its funds for unauthorized purposes.

Equity Jurisdiction.—Equity has jurisdiction of a suit against the officers of a bank to compel restoration of money unlawfully divested by them from the funds of the bank, involving an accounting of such money between the bank's receiver and such officers, it being a suit to compel the execution of a trust.

Liability of Directors—Parties.—When a loss has been caused by the misappropriation of the funds of a national bank, its officers, chargeable with the fault occasioning the loss are all jointly and separately liable for the entire amount divested.

Pleading and Proof.—When the ultimate facts requisite to entitle complainant to the relief he prays are pleaded and proved, he cannot be defeated because he also pleaded other facts not essential to his recovery.

Misappropriation of Funds—Interest.—It is a general rule, both at law and in equity, that, whenever one has wrongfully detained or misappropriated the moneys of another, he must pay interest at the legal rate from the date of the wrong.

Officers as Trustees—Limitations—Laches.*—The officers of a national bank are not the trustees of an express, but of an implied, trust for the bank and its stockholders and creditors, and statutes of limitation and the doctrine of laches may be invoked in their defense.

Laches.—The misappropriation of the funds of the bank by its officers appeared on the books, and was known to its cashier, who had no interest in the matter adverse to the bank, as early as August, 1889. The bank continued in business until shortly before its receiver was appointed in 1894. No complaint of such acts of the officers was made until after the failure of the bank, and no suit was instituted until October 25, 1895. *Held*, that there was no reason to suspend the application of the doctrine of laches at the end of six years after the cause of action accrued when the state statute barred the analogous action at law at such time.

APPEAL from the Circuit Court of the United States for the District of Colorado.

This is an appeal from a decree for the payment of the sum of \$35,093.45, interest thereon, and costs, by John J. Reithmann, George Tritch, Job A. Cooper, D. C. Dodge, and John Good, to the appellee, Zeph. T. Hill, as receiver of the German National Bank of Denver, on account of the misappropriation of the funds of that bank in 1888 and 1889. All the parties against whom this decree was rendered have appealed to this court except Reithmann, who appears to be content with the result below. The decree rests upon this state of facts: In the years 1888 and 1889

Case Stated.

*See note at end of case.

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Reithmann, Tritch, Cooper, Dodge, and Good were directors of the bank. Tritch was its president, and Cooper was its cashier. The bank had acquired the ownership of certain mining claims under an execution sale upon a judgment in its favor of about \$4,500, and by virtue of certain conveyances which it had procured to be made to Cooper, its cashier, in an endeavor to collect its judgment. The legal title to this property was in Cooper, but he held it for the benefit of the bank. Upon the property was some mining machinery. A shaft had been sunk upon it more than 100 feet, and some drifts had been made from this shaft in an endeavor to discover and mine ore. But the former owners had abandoned the undertaking, the machinery was still, and the shaft and drifts were full of water. In February, 1888, the five directors of this bank against whom the decree below was rendered caused a corporation called the Cassandra Consolidated Mining Company to be organized for the purpose of acquiring, developing, and operating mines. They had the certificates of all the stock of this corporation, except a few qualifying shares which were written to its officers, written to themselves, on July 11, 1888, but they never took them out of the stock book of the company. On July 12, 1888, Cooper made a deed of the mining property which he held for the bank to the Cassandra Company. The latter company procured money from the bank, and used it to pump water out of the mine, to sink the shaft deeper, and to prospect for ore, between February 1, 1888, and April 11, 1889, until it had used, in all, \$20,864.82 of the funds of the bank. Upon the books of the bank this money, with the usual interest, was charged as an overdraft against the Cassandra Company. In June, 1888, this overdraft had become \$6,800, and each of these five directors deposited \$1,200 in the bank to the credit of the Cassandra Company, and thus diminished its apparent overdraft by the sum of \$6,000. On October 26, 1889, this mining property had become worthless; and the board of directors on that day passed a resolution to the effect

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that it should be reconveyed to the bank, that the bank should refund to the five members of the board the \$6,000 which they had deposited to the credit of the Cassandra Company, and that the bank should assume that company's overdraft. Pursuant to this resolution, Cooper, who claimed that his deed to the Cassandra Company had never been delivered, although it appeared upon the records of the county, made a deed of this property to John J. Reithmann, who had then acquired a controlling interest in the bank, for the benefit of the bank; and in December, 1889, the bank paid back to each of the five directors the \$1,200 which he had deposited with the bank for the Cassandra Company in June or July, 1888. During all the time when these transactions were going on the bank was solvent and prosperous, and the appellants owned a majority of its stock, and controlled and managed it. The stock was selling in October, 1889, when the resolution to return this mining property to the bank was passed, at the rate of \$325 for a share, which was of the par value of \$100. About this time the appellants sold their stock in the bank, and the control and management of it was turned over to Reithmann and his friends. On July 6, 1894, the bank became insolvent, and the appellee, Hill, was appointed its receiver. This suit was commenced by this receiver on October 25, 1895. In his bill he alleged the facts we have stated, averred that the moneys of the bank used through the Cassandra Company were misappropriated and lost by the five directors in a futile attempt to develop and explore this mining property, and that this was done by them for their own benefit, and for the purpose of speculation. He alleged that the Cassandra Company was organized and owned by the five directors, that they caused the mining property to be conveyed to it, and that they intended to take the benefit of any advance in its value if paying ore was discovered and meant to charge the bank with any loss they sustained if their speculation was unfortunate. He alleged that their speculation was disastrous, and in pursuance

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of their intention they charged the bank with their loss, and escaped without harm. The appellants answered that the mining property was at all times owned by the bank, that the Cassandra Company was organized and operated by them in the interest of the bank, that the purpose of its organization was to form a conduit through which the mining property might be conveyed to a purchaser, and that this was done because they thought that the bank could realize more by a sale of the stock of the Cassandra Company as the owner of the mining property than it could by a direct sale of the property as the property of the bank. They alleged that in 1888 the mine was full of water, so that it could not be examined by a purchaser or sold; that they authorized the expenditure of the money used through the Cassandra Company for the purpose of pumping out the water, clearing out the shaft and drifts, and putting the property in presentable shape for examination, in the hope and belief that in that way they might secure a purchaser of it for the bank. They averred that they advanced the \$6,000 which they deposited to the credit of the Cassandra Company in the summer of 1888 to the bank, as an accommodation to it, for the purpose of reducing the apparent overdraft of the Cassandra Company. It appeared at the trial that there were seven directors of this bank; that one Clinton, who prior to that time was the assistant cashier, succeeded Cooper as cashier of the bank in August, 1889, and held that office until September, 1893; that Cooper ceased to be a director of the bank on July 1, 1890; that Tritch ceased to be a member of the directory at the annual meeting in January, 1890; and that Dodge ceased to be a member on January 12, 1892. No complaint of the acts of the appellants was ever made until after the bank became insolvent under the management of their successors, nor until after a receiver was appointed for it in the year 1894. Upon this state of facts a decree was rendered in the court below against the five directors for the entire amount of money expended upon this mining property during

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the years 1888 and 1889, with interest from December 23d in the latter year.

Charles J. Hughes, Jr., for appellants.

John S. Macbeth, for appellee.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

SANBORN, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

The bill in this suit contains averments sufficient to warrant a recovery on the ground of an unauthorized use of the funds of the bank to prospect for and to develop a mine on its property, and also on the ground of a willful misappropriation of its funds for the use and benefit of the appellants. We dismiss the latter ground on the threshold of this discussion, because the evidence fails to satisfy us that any of the appellants ever intended to obtain any pecuniary advantage or to make any personal gain out of the transactions under consideration at the expense of the bank, and because, if they did, a suit against them for such a fraud was barred in three years from December 23, 1889, and this suit was not commenced until October 25, 1895. Mills' Ann. St. Colo. §§ 2911, 2909. The contention of the appellee that the cause of action for fraud is not barred by this statute, because the time under it does not commence to run until the discovery of the facts constituting the fraud, has been considered. But the salient facts of this case were spread upon the books of the bank. They were all known in October, 1889, to the cashier, Clinton, who succeeded Cooper when he made the record of the resolution for the reconveyance of the mining property; and Clinton had no interest in this matter adverse to the bank, and he was its chief officer and agent. Notice to him was notice to his principal, the bank. There was no concealment, no secrecy, no deceit, in the acts of the appellant; and the time, under this section of the statute, commenced to run when

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the diversion of the fund was complete. In this state of the facts the receiver and the creditors and stockholders of the bank, whom he represents, stand in its shoes. Their rights here are merely those of assignees of the bank, and as such they have acquired no cause of action which the bank did not have before the receiver was appointed.

The record discloses a case in which the president, the cashier, and the majority of the directors of a bank commenced to expend money upon an abandoned mining property which it owned for the purpose of preparing it for sale, in order that the bank might dispose of it and convert it into money. The shaft and the drifts upon the property were full of water. The machinery had been silent for months. The tools had been stolen, and others were necessary to place the machinery in successful operation. When

National Banks—
Power to Repair
Property for Sale.

a national bank has lawfully acquired real estate or other property, it may sell that property and convert it into money; and, in order to do so, it may clean it, make reasonable repairs upon it, and put it in presentable condition to attract purchasers, in the same way that an individual of sound judgment and prudence would do if he desired to make a sale of the property. The authority to do these things is one of the incidental powers vested in the corporation under section 5136 of the Revised Statutes, which provides that a national bank shall have authority:

“Seventh. To exercise by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking by discounting and negotiating promissory notes, drafts, bills of exchange and other evidences of debt; by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money on personal security; and by obtaining, issuing and circulating notes according to the provisions of this title.”

The duty of exercising this power is imposed upon

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the directors and officers of such a bank, and the authority to determine in the first instance when and to what extent it shall be exercised is necessarily intrusted to their judgment. Moreover, they cannot escape the discharge of this duty. They are bound to consider and decide the question at their peril. It follows that, when they have honestly and carefully considered and decided it, they ought not to suffer because, in the light of subsequent events, which could not be foreseen, it turns out that their decision was unfortunate. This mining property was unsalable with the shaft and drifts filled with water, the machinery silent, and the tools gone. It is common knowledge that a mine or a prospect for a mine is much more likely to find a purchaser, and much more likely to realize a fair price, when work is in active progress upon it, than when it is still and desolate. The officers of this bank decided to pump the water out of the shaft and drifts of this property, to put it in condition in which it could be examined by a purchaser, to start the machinery, and to do all this in the hope that by so doing they might find a purchaser for property that was unproductive and worthless in its then condition. An examination of the evidence discloses the fact that the necessary expense of placing this property in condition for examination and sale was at least \$1,000, and perhaps \$2,000. The directors failed to find a purchaser for the property, and the bank lost this money. But in view of the fact that the management and sale of the property was intrusted to their discretion, and that the burden of deciding whether or not this expenditure should be made was imposed upon them, we are unwilling to say that their action in expending \$2,000 for this purpose was either unauthorized, wrongful, or culpably negligent. We are of the opinion that an expenditure of this amount may be said to have been properly made in the honest exercise of a discretion vested in them, and that they ought not to be personally liable because the use of this money did not secure the purchaser they sought and expected to obtain. The unfortunate part of this case is that they

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did not stop here. When the shaft had been cleared of water and the machinery had been put in operation, when the property was in proper condition for examination and for sale, and when no purchaser was found, they proceeded to expend \$18,864.82 more in prospecting for paying ore upon property in which none has ever been discovered. It was not only beyond their authority as officers of the bank, but *ultra vires* of the bank itself, to carry on ordinary mining, manufacturing, or trading business,—much more, to expend its money in such a speculative venture as prospecting for ore where none of value ever had been found. The statutes of the United States are the measure of the powers of national banks, and these corporations can lawfully exercise none but those there expressly granted, and those fairly incidental thereto. Omaha Bridge Cases, 10 U. S. App. 98, 174, 2 C. C. A. 174, 230, and 51 Fed. 309, 316; Bank v. Townsend, 139 U. S. 67, 73, 11 Sup. Ct. 496; Bank v. Kennedy, 167 U. S. 362, 366, 17 Sup. Ct. 831; Bank v. Smith's Ex'r 40 U. S. App. 690, 704, 23 C. C. A. 80, 87, and 77 Fed. 129, 137. The officers of these banks are bound to know they are charged by the law with the knowledge of the extent and limitations of the powers of the corporations for which they act, and of their own authority as the agents of these corporations. It is said that they are not technically trustees of express trusts, but they are the agents of the bank, charged, under the national banking laws, with an implied trust to use the funds of the bank for the purposes specified in these laws, only, and to preserve them for their creditors and stockholders. Every agent incurs a personal liability to his principal for losses occasioned by his unauthorized acts under the general law, and the officers of corporations are no exception to the rule. Upon this principle the directors and the other officers of a national bank become personally liable to the bank and its successor in interest, its receiver, for losses caused by their use of its funds for unauthorized purposes, as well as for culpable negligence

Same—Ultra
Vires.Same—Same—
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in their use and for their fraudulent appropriation. *Williams v. McKay*, 40 N. J. Eq. 189, 200 ; *Mor. Corp.* §§ 555, 556 ; *Bank v. Wilcox*, 60 Cal. 126, 141.

It is insisted, however, that there can be no recovery of the appellants in this suit on account of the diversion of the funds of this bank to the business of prospecting for ore upon its property (1) because there is a complete remedy for the appellee at law, and therefore there is no jurisdiction of this suit in equity ; (2) because the liability of the appellants is several, and not joint ; (3) because the appellee pleaded that the appellants fraudulently misappropriated this money for their own benefit ; and (4) because the suit is barred by the statute of limitations and by laches. We will consider these objections in their order.

1. This is a suit to compel the restoration to a trust fund of \$20,864.82 which the appellants unlawfully diverted from that fund, and it involves an accounting of the money diverted between the receiver and the appellants. It is therefore a suit against officers of a bank to execute a trust and to Equity Jurisdiction. compel an accounting, and it avoids a multiplicity of suits at law. This court has repeatedly held, for reasons which now seem to us obvious, and which are stated at length in our opinions, that equity has jurisdiction of such a suit. *Hayden v. Thompson*, 36 U. S. App. 362, 367, 17 C. C. A. 592, 594, and 71 Fed. 60, 62 ; *Cockrill v. Cooper*, 57 U. S. App. 576, 29 C. C. A. 529, 535, 538, and 86 Fed. 7, 12, 16.

2. Are the appellants jointly liable for the misappropriation ? All the appellants knew of the misappropriation while this diversion was going on. Some of them directed, and all of them consented to, it. No objection or protest or endeavor to prevent or stop it was made by any of them, and, when the amount used reached \$6,800, each of them contributed \$1,200 to replace a portion of the misappropriated money, and subsequently reimbursed himself for this contribution out of the funds of the bank. Each of these officers was there-

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fore at fault, and hence liable for the entire amount diverted. When a loss has been caused by the appropriation of the funds of a corporation to a purpose unauthorized by its charter, or by culpable negligence, or by a conversion of its funds, all the officers of the corporation who are chargeable with the fault which has occasioned the loss are liable for the entire misappropriation, without regard to the degree of dereliction of which each is guilty. 2 Lewin, Trusts, p. 1220; Williams v. McKay, 46 N. J. Eq. 25, 39, 18 Atl. 824. The appellants cannot escape here on the ground that each is separately liable for the amount which he misappropriated only, because they are all both jointly and separately liable for the entire amount diverted.

3. Must the decree be reversed because the appellee pleaded that the diversion was made with a fraudulent intent? The facts set forth in the bill are ample to warrant a recovery for the unauthorized use and loss by the appellants of the money in question in the business of prospecting for ore on the property of the bank, and these facts have been proved. But the bill contains other allegations to the effect that the appellants used and lost this money fraudulently, with the intent to get gain for themselves by causing the property on which it was expended to be conveyed to the Cassandra Company for the purpose of subsequently selling it at a profit for their individual benefit if paying ore was discovered, while they meant to saddle the loss upon the bank if the speculation proved disastrous. The appellee failed to prove these averments of fraud, and it is contended that this failure is fatal to a recovery on any ground under this bill. But the gravamen of the bill was the wrongful diversion of the trust fund. If the cause of action for the fraudulent diversion of the fund to the purpose of prospecting on this mining property for their own benefit were inconsistent with the cause of action for its diversion for the unauthorized purpose of prospecting upon it for the benefit of the bank, this objection of the appellants might be

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worthy of consideration. But there is no inconsistency between these two causes of action as they are stated in the bill. On the other hand, the latter cause necessarily inheres in the former, and warrants the same relief. The effect of the bill is to plead the unlawful diversion of the fund by the appellants, and then to plead that it was diverted with a fraudulent intent. If the fund was diverted to the unauthorized purpose, the cause of action was complete, whether the officers intended to appropriate the expected benefit of the speculation to their own use, or to give it to the bank, and a complainant is entitled to any relief which the facts that he pleads in his bill and establishes on the trial justify. When the ultimate facts requisite to entitle him to the relief he prays are pleaded and proved, he cannot be defeated because he also pleaded other facts not essential to his recovery, which he did not prove. *Espey v. Lake*, 10 Hare, 260, 264.

Another objection to the decree is that the court below allowed interest on the amount misappropriated, and it is contended that this was erroneous, because this case does not fall among those in which interest is expressly allowed by the statutes of Colorado (Mills' Ann. St. § 2252). But this is a suit in equity, and no statute is necessary to give a court of equity power to allow interest on moneys unjustly detained or misappropriated. When interest is reserved in a contract, or is implied from the nature of the promise, it becomes a part of the debt, and is recoverable as of right. When money has been misappropriated or converted to his own use by a defendant, interest is given as damages to compensate the complainant for the loss of the use of his funds. In cases of the latter class, its allowance is sometimes a matter of discretion; but it is a general rule, both at law and in equity, that, whenever one has wrongfully detained or misappropriated the moneys of another, he must pay interest at the legal rate from the date of the misappropriation or from the beginning of the detention. *Swinisen v. Scawen*, 1 Dickens, 117;

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Redfield v. Iron Co., 110 U. S. 174, 176, 3 Sup. Ct. 570; United States v. North Carolina, 136 U. S. 211, 218, 10 Sup. Ct. 920; Jourolmon v. Ewing, 47 U. S. App. 679, 686, 26 C. C. A. 23, 27, and 80 Fed. 604, 607; Filmore v. Reithman, 6 Colo. 120, 131; 1 Sedg. Dam. §§ 301, 303.

4. Finally it is claimed that this cause of action is barred by the statute of limitations and by laches, and sections 2900, 2909, 2911, and 2912 of Mills' Annotated Statutes of Colorado are invoked to sustain this contention. Section 2900 provides that all actions of assumpsit or on the case, founded on any contract or liability, express or implied, shall be commenced within six years next after the cause of action shall accrue, and not afterwards. Section 2909 declares that, in cases of concurrent jurisdiction in the courts of common law and the courts of equity, the same limitations shall apply to suits in equity and to actions at law. Section 2911 limits the time for the commencement of suits for relief on the ground of fraud to three years after the discovery of the facts constituting the fraud. Section 2912 provides that bills of relief, in case of the existence of a trust not cognizable by the courts of common law, shall be filed within five years after the cause of action accrues, and not later. The last section does not govern the cause of action here in suit, because that cause is based on the disregard of their powers by the agents and implied trustees of a corporation, and this cause of action, as well as the trust relation from which it springs, is cognizable at law as well as in equity. It does not fall under section 2911, because fraud was not essential to its maintenance and was not proved, and the decree stands upon the simple diversion of the funds of the bank to an unauthorized purpose. It rests on the implied liability created under the law by the relation of the appellants, as its officers, to the bank. Why does it not fall under section 2900? The appropriate action at law to enforce the implied liability upon which it rests is an action on the case, and this section provides that the time for the com-

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mencement of such an action is limited to six years from the time when its cause accrued. The conclusion is inevitable that an action at law for the cause upon which this decree is based would have been governed by section 2900, and could not have been maintained six years after its cause accrued. The natural result of this conclusion is that this suit ought to be governed by the same rule, both on the ground that courts of equity usually apply the doctrine of laches in analogy to the statute of limitations relative to actions at law of like character, and on the ground that section 2909, *supra*, expressly requires it to be so applied.

The appellee endeavors to escape from this limitation on the ground that these appellants were trustees of an express trust, and that consequently no time runs in their favor. It must be conceded that express trusts are not within the statute of limitations, because the possession of the trustee is presumed to be the possession of the *cestui que trust*. But lapse of time is a complete bar to a constructive or implied trust, both in equity and at law, unless there has been a fraudulent concealment of the cause of action, or other extraordinary circumstances which make the application of the doctrine of laches inequitable. *Hayden v. Thompson*, 36 U. S. App. 362, 377, 17 C. C. A. 592, 601, and 71 Fed. 60, 69. The question presented then is, are the officers of a national bank the trustees of an express trust for its creditors and stockholders, within the meaning of this rule? They are not parties or privies to any express contract or agreement to hold and use the funds of the bank for the purposes prescribed by the acts of congress. They are not parties or privies to any express declaration of trust or agreement with the stockholders or creditors of their bank which sets forth the terms on which they hold its funds for their benefit. They are the mere agents of the bank to discharge the duties imposed upon it and upon them by the law of its being, by the statutes of the United States, and the common law of the land. Their liability arises from no express agreement, but from their

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violation of their duties as such agents. They unquestionably stand in a fiduciary relation to the bank, to its stockholders, and its creditors, and they hold its assets in trust for these beneficiaries. But there is no express agreement or declaration of this trust to be found, and they cannot be truthfully said to be trustees of an express trust. The trust with which the property of the bank is impressed in their hands arises from the law, and from their acceptance of the office they hold. It is not an express trust arising from contract or privity, but an implied or resulting trust created by the operation of the law upon their official relation to the bank. The result is that the officers

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of a national bank are not the trustees of an express, but of an implied, trust for the bank and its stockholders and creditors, and statutes of limitation and the doctrine of laches may be invoked in their defense. *Hayden v. Thompson, supra*; *Briggs v. Spaulding*, 141 U. S. 132, 147, 11 Sup. Ct. 924; *Mor. Corp.* § 516; *Spering's Appeal*, 71 Pa. St. 11; *Hughes v. Brown*, 88 Tenn. 578, 13 S. W. 286; *Wallace v. Bank*, 89 Tenn. 630, 15 S. W. 448. The controversy thus narrows itself to this question: Has the bank or its receiver been guilty of such laches that they ought not to be permitted to maintain this action? Ordinarily laches runs *pari passu* with the statute of limitations. If the latter has barred the analogous action at law, laches has stayed the corresponding suit in equity. But if unusual conditions or extraordinary circumstances make it inequitable to allow the prosecution of a suit after a briefer, or to forbid its maintenance after a longer, period than that fixed by the statute, the chancellor will not be bound by the statute, but will determine the extraordinary case in accordance with the equities which condition it. *Kelley v. Boettcher*, 56 U. S. App. 363, 375, 29 C. C. A. 14, 21, and 85 Fed. 55, 62. If the acts of the appellants, upon which this suit is founded had been parts of a continuous and persistent course of action which had wrecked this bank and robbed its creditors and stock-

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holders, if they had been accompanied with intentional misrepresentations, if they had been purposely or negligently concealed from the other officers and employees of the bank or from its stockholders and creditors, these facts might well induce a court of equity to permit this suit to be maintained notwithstanding the statute. The case at bar presents a very different state of facts. When this money was diverted the bank was solvent and prosperous. Its management by the appellants appears to have been beneficial and successful. Its stock was selling at \$325 per share laches. of the par value of \$100. The appellants sold their stock and turned over the control of the bank to others. The diversion and use of this money appeared on the books of the bank, and was known to the cashier, Clinton, who succeeded Cooper, as early as August, 1889. The bank continued in business until 1894. No complaint of the acts of the appellants was made until after its failure, and no suit was instituted until October 25, 1895. There is certainly nothing in this state of facts to warrant a refusal to permit the doctrine of laches to have its accustomed effect; nothing to induce us to suspend its application at the end of six years after the cause of action accrued when the statute of Colorado barred the analogous action at law at that time. The bank and the receiver were too late to maintain this action at the expiration of six years from the time its cause accrued.

An application of the principles and rules that have been considered will quickly dispose of this case. The appellants commenced to use the funds of the bank to clear out the shaft and prepare the property in question for sale in February, 1888. They began to divert the moneys of the bank to prospect for ore at some time before July 1, 1888; for at that date they had used \$6,800 upon this property, when only \$2,000 was necessary to make it presentable to purchasers. They completed their misappropriation of the moneys on April 10, 1889. The wrong was then done, the cause of action was complete, and the statute of limitations

Note

and laches would have prevented the maintenance of any suit upon it which was commenced more than six years after that date, if the operations of the appellants had stopped here. Unfortunately for the appellants, they did not. In June or July, 1888, they and Reithmann had refunded to the bank \$6,000 of the \$6,800 which had then been expended on the mining property, and on or about December 23, 1889, they caused the bank to repay to them this \$6,000. We have already held that they were authorized to expend \$2,000 to put this property in salable condition, and as this \$2,000 was refunded to the bank, in the \$6,000 paid to it by them in the summer of 1888, they were entitled to a return of this money in December, 1889. To that extent the repayment in that month may be sustained. But \$4,000 of the \$6,000 which they then received was repaid to them on account of money which they had wrongfully diverted from the funds of the bank, and for which they were personally liable. The bank did not owe them this \$4,000, and they took it from its funds without lawful authority, and in violation of their trust. All their other misappropriations were made more than six years before the commencement of this suit, and their recovery is barred by laches. But this was within the six years, and the appellee is entitled to a decree for its recovery. The decree below is accordingly reversed, and the case is remanded to the court below, with instructions to enter a decree in favor of the appellee and against the appellants for the recovery of \$4,000, and interest from December 23, 1889.

NOTE.

Directors—Misappropriation—Statute of Limitations.—Directors of a corporation, being trustees of an implied trust, may plead the statute of limitations as a defence to a suit in equity for their misconduct in the management of the corporation's affairs. *Williams v. Halliard*, 38 N. J. Eq. 373; *Spering's Appeal*, 71 Pa. St. 11.

See *contra*, *Ellis v. Ward* (Ill.), 20 N. E. Rep. 671, in which case the court said: "It is a principle of general application, and recognized by this court, that the assets of a corporation are, in equity, a trust fund (*St. Louis & Sandoval Coal & Mining Co. v. San-*

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doval Coal & Mining Co., 116 Ill. 170, 12 Am. & Eng. Corp. Cas. 286), and that the directors of a corporation are trustees, and have no power or right to use or appropriate the funds of the corporation, their *cestui que trust*, to themselves, nor to waste, destroy, give away, or misapply them. *Holder v. Lafayette, B. & M. R. Co.*, 71 Ill. 106; *Cheeney v. Lafayette, B. & M. R. Co.*, 68 Ill. 570, 1 Mor. Priv. Corp. §§ 516, 517. And it is equally well settled that no lapse of time is a bar to a direct or express trust, as between the trustee and *cestui que trust*. *Chicago & E. O. R. Co. v. Hay*, 119 Ill. 493; *Wood, Lim.* § 200, and cases cited in note. If the trust assumed by the directors of a corporation in respect of the corporate property under their control is to be regarded as a direct trust, as contradistinguished from simply an implied trust, then it is apparent, under the rule announced, the statute presents no bar to this proceeding by the receiver of the corporation. Ordinarily, an express trust is created by deed or will; but there are many fiduciary relations established by law, and regulated by settled legal rules and principles, where all the elements of an express trust exist, and to which the same legal principles are applicable, and such appears to be the relation established by law between directors and the corporation. 2 Pom. Eq. Jur. § 963; 3 Pom. Eq. Jur. §§ 1088-1090, 1094. And see, also, as respects stockholders, *Hightower v. Thornton*, 8 Ga. 486; *Payne v. Bullard*, 23 Miss. 88; *Curry v. Woodward*, 53 Ala. 371. The statute, therefore, presented no bar."

WARREN *et al.*

v.

ROBISON *et al.*

(Supreme Court of Utah, April 26, 1899.)

Banks—Mismanagement of Corporate Affairs—Power of Directors to Escape Liability by Delegating Authority.—A board of directors of a banking corporation is elected primarily for the management of the corporate affairs; and when the board delegates its authority to the executive officers, and through their carelessness and mismanagement disaster and loss to the stockholders and creditors ensue, the individual members of the board cannot escape liability by showing that they did not know of the unfortunate transactions, and were ignorant of the business of the corporation.

Duties of Bank Directors.*—Directors of a banking corporation are bound to use ordinary care and prudence, and to exercise over the affairs of the bank such supervision and vigilance as a discreet person would exercise over his own affairs.

Directors Neglecting Duties—Liability—Prima Facie Case.—A showing that certain directors of a defunct banking institution

*See note at end of case.

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were careless and negligent in the performance of their duties as such directors, that they exercised no supervision over the conduct of its affairs, but turned everything over to the executive officers, and allowed loans to be made to the officers of the bank and to others, practically without security, and that these loans resulted in wrecking the bank, in an action on behalf of stockholders and creditors for an accounting and for damages, is a sufficient showing to establish a *prima facie* case against such directors, and a nonsuit as to them was improperly granted.

(Syllabus by the Court.)

APPEAL by plaintiffs from Second district district court. *Reversed in part and affirmed in part.*

M. D. Lessenger, A. J. Weber, Elijah Farr, and Bennett, Harkness, Howat, Bradley & Richards, for appellants.

L. R. Rogers, T. D. Johnson, R. H. Whipple, J. S. Boreman, and Marshall, Royle & Hempstead, for respondents.

BARTCH, C. J. This action was instituted by the plaintiffs, as stockholders of defendant Citizens' Bank, in behalf of themselves and all other stockholders,

creditors, and others similarly situated, against the defendants for an accounting, and for damages alleged to have been occasioned by reason of negligence in the management of the bank by its directors and officers. It appears that the bank was organized about August 11, 1890, with a capital stock of \$150,000, and the banking business commenced soon thereafter. It failed, and made an assignment for the benefit of its creditors on December 26, 1893, and afterwards a receiver was appointed. The defendants H. H. Spencer, George Murphy, Ad. Kuhn, John Maguire, R. A. Wells, Newall Beeman, George W. Perkins, S. S. Schramm, and W. W. Corey were directors. W. W. Corey was the first president, and Newall Beeman was the president when the bank failed. The defendant Theodore Robison was vice president and manager, and Charles M. Brough was cashier. J. C. Armstrong was receiver. The transactions which resulted disastrously to the bank, and

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which, it is claimed, were made because of the negligence of the directors and officers, are of such a character as to require careful investigation. It is certainly quite startling to notice that a bank in the hands of honest business men, as the directors and officers were reputed to be, should in so short a space of time meet with so many heavy losses as to actually wreck the institution. The losses, it appears from the testimony, began immediately upon the commencement of the business, as is evidenced by the shortage of Barbour, the first cashier, who, although a banker of good reputation, was, it seems, a stranger to the directors. He was placed in charge of the funds of the bank without first having given a bond, as required by the articles of incorporation, in respect to active executive officers, and through the leniency of the directors had given no bond at the time of his death, which occurred about three weeks after the commencement of the corporate business. Then, upon the cash being counted, a shortage of \$3,600 was discovered, which resulted in a total loss. Soon after the organization of the bank, the Anderson Pressed-Brick Company, a new corporation, became one of its customers, and loans were made to it, which resulted in a loss to the bank of \$22,000. That corporation was capitalized at \$50,000, and one witness said its plant was worth in the neighborhood of \$45,000, while other witnesses estimated its value to have been, about the time the loans were made, from \$12,000 to \$20,000. One of the directors of the bank was also a director in the brick company. After the loans were made, security was taken on the plant; but, owing to a misdescription in the mortgage, the security proved to be worthless, after the company had become otherwise involved and judgment had been entered against it. In 1891 the Junction City Driving-Park Association was organized for the purpose of promoting an interest in horses. Several directors of the bank became also directors of the association, and the president of the bank was its president, and the vice president of the

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bank was the treasurer of the association. Through this association, by way of loans and overdrafts, made and permitted, it appears, without security, the bank lost about \$1,700. So the Junction City Paint Company borrowed of the bank \$4,750, and afterwards another creditor, it appears, attached the property of the company, and then the bank bought in the stock for \$4,360, paid off the judgment of the creditor, and carried on the paint business, under the name of H. Gillette & Co., until a purchaser was found for the stock. The loss to the bank occasioned by this transaction was over \$9,000. The bank was also unfortunate in dealings with Corey Bros. & Co. Its president, W. W. Corey, was a member of that firm, and the firm borrowed money from the bank from time to time, without security, until, when it failed in business and assigned, it owed the bank \$28,000. The firm had also borrowed from another bank about \$70,000, but that, it seems, was secured by real estate. The evidence relating to the transactions resulting in the \$28,000 yet remaining unpaid is such, to say the least, as to raise a strong suspicion of negligence on the part of those whose duty it was to supervise the affairs of the bank, and it savors much of a violation of law. The loan to James C. Lonergan of \$700 also resulted in a loss to the bank. This loan was recommended by one of the directors, and was made without security. So it appears the bank lost \$3,200, through loans and overdrafts, without security, except some bank stock, to Theodore Robison, its manager. Likewise its cashier, Helfrich, made overdrafts and received loans which resulted in a loss to the bank of \$6,375. The overdrafts, it appears, he began to make in October, 1890. Another loan which proved unfortunate and a loss to the bank was one of \$10,000 to the Cache Valley Land & Canal Company. The plaintiffs claim this loan was made indirectly to the officers of the bank. It appears that Robison, the manager of the bank, was also president of the canal company; that Brough, the bank's cashier at the time of the loan, was treasurer and

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director of that company; and that Corey, the president of the bank, was vice president and a director of the company. The canal and property of that company were situated in the state of Idaho. Such are the losses complained of in this case, and, as will be noticed, they aggregate over \$84,500. At the trial, when the plaintiffs rested their case, various motions for nonsuit were made, and, upon argument, granted by the court, except as to defendant W. W. Corey.

The important question presented is, did the plaintiffs make out a *prima facie* case? To determine this, it is necessary to consider first the degree of care and diligence and the extent of supervision which must be exercised by directors and officers of a banking institution, so as to discharge their duty to stockholders and creditors, and then ascertain whether, under the evidence as it now appears, all or any of the defendants exercised such supervision, skill, and diligence as the circumstances and nature of the business required. It is not contended that the directors knowingly permitted any violation of law in any banking transaction, or that they were dishonest in the administration of the bank's affairs; but it is insisted that they wrongfully intrusted the exclusive management and control of the banking business to the cashier and manager, and were negligent in the performance of the duties imposed upon them by law.

The statute under which this bank was incorporated, and its business transacted, is found in the Compiled Laws of Utah 1888, and provides in section 2498, subds. 5, 7, as follows: "(5) To elect by its stockholders, directors from time to time, and by its board of directors, to appoint a president, a vice-president, cashier and such other officers as shall be provided for in its articles of association, define their duties, require bonds of them, and fix the penalty thereof, dismiss such officers or any of them at pleasure, and appoint others to fill their places. * * * (7) To exercise

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by its board of directors or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking by discounting or negotiating promissory notes, drafts, bills of exchange and other evidences of debt, by receiving deposits, by buying and selling exchange, coin and bullion, and by loaning on personal or real security." No doubt the board of directors of a bank incorporated under the act of which these provisions form a part may appoint executive and other officers, as therein provided, and may "carry on the business of banking" through such officers; but this does not release the directors from the duties which devolve upon them. It does not follow that the responsibility of the board, or of the individual director, ends with the appointment of honest men to the executive offices. The language of the statute does not enable the directors to say that they have no duties of supervision and control. If it had been the intention of the legislature that the officers provided for should have full control, without supervision, of the business transactions and affairs of a bank, then it would have been a useless thing to provide for a board of directors, for the stockholders could elect such officers as easily as they could the board. The legislature had in view no such purpose. The directors were not intended to be mere figureheads without duty or responsibility. The manifest design of the lawmakers was that the officers, elected by the board, were to look after and attend to the details of business, and generally to conduct ordinary business matters. They are the means with which the directors are to administer the affairs of the bank. It is therefore the right and duty of the directors to take upon themselves the management of the institution, and to exercise and maintain a supervision over all business operations, upon the skillful and wise conduct of which depend the prosperity of the institution and the safety of those dealing with it. This duty of management and supervision they cannot shift upon the officers, and such duty is imposed as to no depart-

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ment of the banking business more certainly than that of making loans and discounts, Morse, Banks, § 117. It is true, the executive officers attend to and execute the details of the transactions of the institution ; but it is nevertheless incumbent upon the board of directors to possess a general knowledge of the character of the transactions and of the manner in which they are made. While such directors are not required to watch the ordinary routine of business, or observe the exact state of each day's accounts, still they are bound to possess a general knowledge of the manner in which the business is transacted, and of the character of the transactions, and to maintain such a degree of vigilance over, and intimacy with, the business as will enable them to know to whom and upon what security the large lines of credit are given. Especially is this so as to large loans and discounts, or matters at once affecting the stability and prosperity of the bank, and the safety of depositors. It is true, directors of a banking institution will not be held responsible for sudden and unexpected violations of law or duty by executive officers, or for losses which ordinary vigilance could not prevent. Nor is a director responsible for acts committed, transactions made, or losses incurred before he became a member of the board, or for any act of the board done in his absence and without his knowledge and assent, or for the default of a co-director, made without his connivance or assent. *Briggs v. Spaulding*, 141 U. S. 132, 11 Sup. Ct. 924. The duties of officers appointed by the board are of an executive character, and relate mainly to details, and doubtless the making of a loan or discount in any considerable amount, or the transaction of other business of moment, should be preceded by an authorization from the board. The duties of directors are administrative, relate to supervision and direction, and when it is sought to hold them responsible for a dereliction of duty, because of which a loss occurred to stockholders and creditors, they cannot evade liability by pleading ignorance of the affairs of the institution,

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incompetency, or gratuitous service, or that the management of the banking business was in the hands of the cashier or other executive officer. "Where there is a duty of finding out and knowing, negligent ignorance has the same effect in law as actual knowledge. While the directors of a corporation may and must, as already stated, commit the details of its business to inferior officers, this does not absolve them from the duty of maintaining a reasonable supervision, and, if such inferior officers waste the assets of the corporation, it is conceded that the directors cannot escape liability on the ground that they did not know of the wrongdoing, provided that it appear that their ignorance was the result of a want of that care which ordinarily prudent and diligent men would exercise under similar circumstances." And their liability does not depend upon statute. "The liability of directors to the corporation for damages caused by unauthorized acts rests upon the common-law rule which renders every agent liable who violates his authority to the damage of his principal. A statutory prohibition is material, under these circumstances, merely as indicating an express restriction placed upon the powers delegated to the directors when the corporation was formed." Mor. Priv. Corp. § 556; Brinckerhoff v. Bostwick, 88 N. Y. 52. Such is likewise the case where damages have resulted to stockholders and creditors through unauthorized acts or omissions of duty in the management of the corporate business. Nor is such liability affected by the technical relation existing between the directors and the corporation, stockholders, or creditors. It exists, whether the relation be that of trustees to *cestui que trust*, or of agents to principals. Doubtless, as between the bank and a director, it is mainly that of principal and agent, while under some circumstances the relation of trustee to *cestui que trust* may exist. Whatever the technical relation may be, to determine what acts or omissions amount to actionable negligence is a matter of no little difficulty. Undoubtedly each

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case must depend upon its own peculiar circumstances. The opinions of judges respecting the degree of care, skill, and diligence which directors of a banking institution must exercise in order to avoid liability for negligence are not all harmonious. That they must exercise some degree of care and diligence is not subject to controversy. What degree of negligence will render them liable? What degree of care and diligence must they exercise to avoid liability? Some of the courts have held that such directors are liable only for "*crassa negligentia*," which, taken literally, means "gross negligence." That phrase, however, has been held to mean a want of ordinary care and diligence.

In *Scott v. Depeyster*, 1 Edw. Ch. 513, the vice chancellor said: "I think the question in all such cases should and must necessarily be whether they have omitted that care which men of common prudence take of their own concerns. To require more would be adopting too rigid a rule, and rendering them liable for slight neglect; while, to require less, would be relaxing too much the obligation which binds them to vigilance and attention in regard to the interests of those confided to their care, and expose them to liability for gross neglect only, which is very little short of fraud itself." In *Appeal of Spring*, 71 Pa. St. 11, MR. JUSTICE SHARSWOOD said: "They [directors] can only be regarded as mandataries,—persons who have gratuitously undertaken to perform certain duties, and who are therefore bound to apply ordinary skill and diligence, but no more." In 3 *Thomp. Corp.* § 4104, the author says: "While a class of decisions places the liability of directors under this head on a ground more favorable to them, by restraining it to cases of gross and habitual negligence, nonattendance, and inattention to their duties, yet none of the decisions exact more than reasonable business knowledge and skill, strict good faith, and a reasonable measure of care and diligence, under the circumstances of the particular case." And in section 4106 he says: "It is plain that the expression 'gross negligence' is loosely

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used in many of the judicial decisions, and that it is sometimes used as the mere antithesis of a 'want of ordinary care.' " Hun v. Cary, 82 N. Y. 65; Society v. Underwood, 9 Bush, 609.

Evidently persons who, as directors, assume control of a banking institution must exercise such a degree of care, skill, and diligence as is required by the situation and nature of the business. By taking such positions, although without compensation, directors invite confidence that they possess at least ordinary knowledge and skill, and that they will do all that men of reasonable prudence and caution ought to do to protect the interests of stockholders and depositors, or those dealing with the institution. The public, therefore, have a right to suppose that they are men of high character for integrity, of reasonably sound judgment, and of such good business sense as is necessary to conduct the affairs of the bank wisely and with reasonable safety. Acting upon this supposition, the public trust their deposits with the bank in the confidence that the important duty of management and direction will be discharged by the directors. The directors, however, ought not to be held to the highest degree of care and diligence, for that might prevent men, whose unspotted reputation and good business judgment would give character and stability to the institution, from accepting such positions; nor should they be held to the slightest degree, for that would have a tendency to destroy public confidence, and few men would be willing to deposit their money with the bank. The rule most in harmony with the character and well-being of such an institution appears to be that the directors, in administering its affairs, must exercise ordinary care, skill, and diligence. Under this rule, it is necessary for them to give the business under their care such attention as an ordinarily discreet business man would give to his own concerns under similar circumstances, and it is therefore incumbent upon them to devote so much of their time to their trust as is necessary to familiarize them with the busi-

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ness of the institution, and to supervise and direct its operations. That the board of directors can leave the management of the banking business to the executive officers, and then when, through carelessness and mismanagement, disaster to the stockholders and creditors ensues, avoid liability, on the ground that they did not know of the unfortunate transactions, and were ignorant of the business, is a notion which must be repudiated. If, however, directors, acting in good faith, and with reasonable care, skill, and diligence, nevertheless fall into a mistake, either of law or fact, they will not be liable for the consequences of such mistake. Bearing upon the general subject herein discussed is the very instructive case of *Charitable Corp. v. Sutton*, 2 Atk. 400, where the action was brought for relief against the defendants, committeemen and other officers of a corporation, for breaches of trust, fraud, and mismanagement, and in which were involved questions of the liability of directors. Among the objects of the corporation was that of banking with notes payable on demand within the amount of the stock, and of lending money on pledges, etc. Among the things complained of was a method of advancing money several times upon old pledges, which were not worth more than the first sum lent, or giving credit upon imaginary pledges. Under the charge of *crassa negligentia*, the breaches of duty, among others, complained of, were nonattendance of committeemen or directors upon their employment, never once inspecting the warehouse to see what number of real pledges were there, and putting the whole power into the hands of others. LORD CHANCELLOR HARDWICKE, conceding that the employment was not one affecting the government, said: "I take the employment of a director to be of a mixed nature; it partakes of the nature of a public office, as it arises from the charter of the crown. * * * Therefore committeemen are most properly agents to those who employ them in the trust, and who empower them to direct and superintend the affairs of the corporation. In this respect they may be guilty of

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acts of commission or omission, of malfeasance or nonfeasance." Referring to malfeasance or nonfeasance, the chancellor said: "To instance, in nonattendance: If some persons are guilty of gross nonattendance, and leave the management entirely to others, they may be guilty by this means of the breaches of trust that are committed by others. By accepting a trust of this sort, a person is obliged to execute it with fidelity and reasonable diligence, and it is no excuse to say that they had no benefit from it, but that it was merely honorary; and therefore they are within the case of common trustees. Another objection has been made that the court can make no decree upon these persons which will be just, for it is said every man's nonattendance or omission of his duty is his own default, and that each particular person must bear such a proportion as is suitable to the loss arising from his particular neglect, which makes it a case out of the power of this court. Now, if this doctrine should prevail, it is indeed laying the ax to the root of the tree. But if, upon inquiry before the master, there should appear to be a supine negligence in all of them, by which a gross complicated loss happens, I will never determine that they are not all guilty. Nor will I ever determine that a court of equity cannot lay hold of every breach of trust, let the person be guilty of it either in a private or public capacity."

In *Land Credit Co. of Ireland v. Lord Fermoy*, 5 Ch. App. 763, LORD HATHERLEY said: "I am exceedingly reluctant in any way to exonerate directors from performing their duty, and I quite agree that it is their duty to be awake, and that their being asleep would not exempt them from the consequences of not attending to the business of the company. But we must look at the nature of the business of the company." So, in *Briggs v. Spaulding*, 141 U. S. 132, 165, 11 Sup. Ct. 935, a case on which the respondents appear to rely, MR. CHIEF JUSTICE FULLER, speaking for the court, said: "Without reviewing the various decisions on the subject, we hold that directors must exercise ordinary care and

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prudence in the administration of the affairs of a bank, and that this includes something more than officiating as figureheads. They are entitled, under the law, to commit the banking business, as defined, to their duly-authorized officers; but this does not absolve them from the duty of reasonable supervision; nor ought they be permitted to be shielded from liability because of want of knowledge of wrongdoing, if that ignorance is the result of gross inattention." In that case the law seems to be stated with much liberality in favor of directors, and it seems a very liberal application of the law to the facts was made in favor of the defendants, and four of the justices dissented; but still the conclusion was reached that directors must exercise ordinary care and prudence, holding that the committing of the banking business by them to the officers does not absolve the directors from reasonable supervision. In *Cutting v. Marlor*, 78 N. Y. 459, MR. CHIEF JUSTICE CHURCH said: "A corporation is represented by its trustees and managers; their acts are its acts, and their neglect its neglect. The employment of agents of good character does not discharge their whole duty. It is misconduct not to do this; but, in addition, they are required to exercise such supervision and vigilance as a discreet person would exercise over his own affairs. The bank might not be liable for a single act of fraud or crime on the part of an officer or agent, while it would be for a continuous course of fraudulent practice; especially those so openly committed and easily detected as these are shown to have been. Here were no supervision, no meetings, no examination, no inquiry." So, in *Williams v. McKay*, 49 N. J. Eq. 189, where the observations of LORD CHANCELLOR HARDWICKE and LORD HATHERLEY were referred to with approval, MR. CHIEF JUSTICE BEASLEY, delivering the opinion of the court, said: "I entirely repudiate the notion that this board of managers could leave the entire affairs of this bank to certain committeemen, and then, when disaster to the innocent and helpless *cestuis que trustent* ensued,

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stifle all complaints of their neglects by saying we did not do these things, and we know nothing about them." And again he said: "The misconduct in question was manifested in frequent, glaring instances, and it is not easy to imagine how they, or some of them, failed to be discovered by these boards of managers on the supposition which, in their favor the law will make, that they exercised their office in this respect with a reasonable degree of vigilance. The neglectful acts in question cannot be regarded by the court as isolated instances; for they run through the whole period of the life of this institution, and thus evince a systematic and habitual disregard of the directions of the company's charter, and a very striking indifference with regard to the security of the money held in trust by them."

In *Hun v. Cary*, 82 N. Y. 65, where the question of the degree of vigilance to be exercised by the directors of a savings bank was involved, MR. JUSTICE EARL, speaking for the court, said: "Few persons would be willing to deposit money in savings banks, or to take stock in corporations, with the understanding that the trustees or directors were bound only to exercise slight care. such as inattentive persons would give to their own business in the management of the large and important interests committed to their hands. When one deposits money in a savings bank, or takes stock in a corporation, thus divesting himself of the immediate control of his property, he expects, and has the right to expect, that the trustees or directors, who are chosen to take his place in the management and control of his property, will exercise ordinary care and prudence in the trusts committed to them,—the same degree of care and prudence that men prompted by self-interest generally exercise in their own affairs. When one voluntarily takes the position of trustee or director of a corporation, good faith, exact justice, and public policy unite in requiring of him such a degree of care and prudence, and it is a gross breach of duty—*crassa negligentia*—not to bestow them." So, in *3 Thomp. Corp.*

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§ 4108, with reference to the liability of directors for negligent ignorance of corporate affairs, it is said: "The true theory disregards the subtle and impracticable distinction between ordinary negligence and inattention and gross negligence and inattention, and holds directors responsible for not knowing that of which they had the means of knowledge, and, while relieving them from the responsibilities of insurers, ascribes liability, on the ground of ignorance of that which could have been discovered by that good business diligence which is incumbent upon them." 1 Morse, Banks, §§ 116, 125, 126, 128; 1 Mor. Priv. Corp. §§ 552-562; 1 Reid, Corp. Finance, § 181; 3 Thomp. Corp. § 4113; 2 Am. & Eng. Enc. Law, 114-116; Gibbons v. Anderson, 80 Fed. 345; Marshall v. Bank (Va.) 8 S. E. 586; Houston v. Thornton, 122 N. C. 365, 29 S. E. 827; Mining Co. v. Ryan, 42 Minn. 196, 44 N. W. 56; Iron Co. v. Parish, 42 Md. 598; Ackerman v. Halsey, 37 N. J. Eq. 356; Delano v. Case, 121 Ill. 247, 12 N. E. 676; Martin v. Webb, 110 U. S. 7, 3 Sup. Ct. 428; Bank v. Bosseix, 3 Fed. 817; Brannin v. Loving, 82 Ky. 370; Stephens v. Bank, 88 Pa. St. 157.

Having thus, in the light of authority, considered the degree of care, skill, and diligence which directors of a bank must exercise to avoid liability for acts of commission or omission which result in loss to the institution, its stockholders or creditors, it now becomes important to ascertain whether, under the evidence in this case as

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it now stands, the defendant directors are shown guilty of such negligence as will render all or any of them liable for the losses occasioned by the transactions of which the appellants complain, and the alleged liability is such that facts must be examined as to each of them. The testimony shows that the defendant Beeman was elected director and president of the bank in January, 1893. But one of the loans complained of was made during his term of office, and that was the one to the Cache Valley Land & Canal Company, which was made without his knowledge or consent. After he became

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director and president, he was for some time necessarily absent from the state. He attended various meetings of the board, advised with the manager and cashier, examined the books, notes, accounts, and bills receivable and payable, and about the middle of August discovered the \$10,000 loan of the canal company. Thereupon, it appears, he required a statement of the affairs of the bank from the manager, and upon receiving the same, and making an examination of it, and submitting it to another banker for advice, he, on August 23, 1893, wrote a letter to the manager in which he, in effect, deplored the condition of the bank, criticised the manner of making loans, especially to officers of the institution, instancing the \$28,000 loan to the former president, stated that no loan should be made to an officer, even with ample security, without the unanimous consent of the board of directors, and maintained that the board should vote on all loans above a certain amount, and that overdrafts should be put in the form of notes. In fact, the letter is such as would naturally come from a discreet business man, and indicates a desire on the part of the writer to institute a prudent and diligent administration of the affairs of the institution. The evidence fails to show that the disastrous consequences to the bank, stockholders, and creditors could have been avoided, even by the highest degree of care and vigilance, after he assumed the duties of office. Under these circumstances, the court would not have been warranted in holding him liable, and therefore, as to him, the nonsuit was properly granted. We are also of the opinion that the nonsuit was properly granted as to defendants Maguire and Perkins. It appears they were elected directors about July, 1893, after all the loans complained of had been made, and the plaintiffs failed to make a *prima facie* showing that the crisis which came a few months later was due to any negligence committed by them, or that it could have been averted by any care or vigilance which they could have exercised.

We are further of the opinion that the plaintiffs failed

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to make out a *prima facie* case as to defendant Armstrong, the receiver. The defendant Robison, it appears, was not properly before the court; hence his case calls for no consideration from us. Respecting the remaining defendants, the ruling of the court in granting the nonsuit presents a much more serious question, under the evidence. As to them, the testimony appears to show a different state of facts. Defendant Spencer was elected as a director and member of the executive committee in January, 1892. It was the duty of the executive committee to make and pass on loans. Testifying as a witness, he said that he examined the Corey loan of \$28,000, and thought that most of it was made before he was director. He knew that Corey was an officer of the bank, but did not recollect as to any security for the loan. He was aware of the Gillette & Co. transaction, but did not know whether the debt was for loans or overdrafts. He knew what his duties were as a member of the executive committee. The witness said: "The executive committee met every two or three months. I have explained that the loaning was principally intrusted to Robison and Brough. Frequently, when I was in the bank, Robison would ask me what I thought about certain loans. I don't know whether I was an officer of the Junction City Driving Park or not. I was a director, I believe. The Eccles Lumber Company is a corporation. I am a member of that. We attached the driving park. I don't know when the loan was made to the driving park, or whether they had any personal property at the time or not. We didn't examine the books of the bank very often. We generally looked at the notes, and counted the money on hand, and looked at the cash book as to the amount they should have. We didn't audit the books as a rule. We never examined them." The witness was on Helfrich's bond, but did not know that he had overdrawn, and said they gave the privilege to overdraw accounts to no one. Matters of loans were generally left with the manager and cashier. Defend-

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ant Murphy became director in 1891, and as a witness said: "I know most of the loans complained of in this case. I had nothing to do with them at the time of the making of the loans. I knew nothing about them at the time. I only know what I have heard since about the condition of the Cache Valley Land & Canal Company transaction and the loan made to the Cache Valley Land & Canal Company. I didn't pass on the loan at the time it was made, or at the time of the renewal." Defendant Kuhn assumed the duties of director in January, 1891. As a witness, he, in part, said: "I was one of the executive board of the bank. I don't believe that as a member of that board I passed upon the Anderson Pressed-Brick Company loan. I was in the bank quite often. I very seldom looked at the books. I had an opportunity of looking at them at any time. I looked at the daily blotter once in a while. During all the time I was a director I was a member of the executive board. I remember that Corey got some money there. I passed upon the loan at the time. I think it was \$2,500 that he wanted. I have been in business here 16 or 18 years. I have a man to keep our books. I do not understand bookkeeping. I could probably find an account if I took time for it. I knew that the bank was discounting paper and making loans. I knew its general class of business." He was aware of the Barbour shortage and other transactions of which complaint is made. The loan to the Cache Valley Land & Canal Company was made while he was absent from the state. Sometimes he was absent on business two or three months at a time. He heard of and noticed nothing to arouse suspicion, and had confidence in the manager. So, the defendant Wells testified: "I don't know about the Cache Valley note transaction. I never looked it up, or had anything to do with it. I never examined the books of the bank, or counted the cash. I remember when Barbour was accused of being short in his accounts. It was at the time of Robison and Corey giving their note. I was a director at the time. Robison and Corey told

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me, and gave the directors to understand, that they would stand good for that shortage. * * * I was one of the executive board appointed in 1891. As a member of the board, I did not pass on any of the loans at that time; nor did any of the board in my presence pass on any loan. I was in some of the meetings. Kuhn, Spencer, and Cahoon were the other members of the committee, I think. When I was a member of the executive board I never passed on any loans. I left the whole matter to Helfrich and Robison, and delegated my power to them." On cross-examination the witness said: "I was one of the first directors, and was appointed upon the executive board to pass upon the sufficiency of securities and such as that. I attended meetings and had stock in the bank. We did not have the list of notes, or the note pouch placed upon the table. The books were there, but I never was at a meeting where they examined any of the notes. I knew what my duties were, and understood the purpose of my appointment. I knew that the stockholders were looking to me to protect their interests; but I didn't do it. I just let it go by default. I don't suppose the other members of the board were as derelict as I was."

The testimony of defendant Corey is, in part, as follows: "I was the first president of the Citizens' Bank. I do not think that J. P. Barbour, the first cashier, gave a bond while acting as such. I did borrow money in March, 1893, and at different times, from the bank, while president. I don't remember how much. I did not give any security at that time. Robison passed on the loan. I don't remember anything about a \$3,700 note. I do remember about an indebtedness of mine and the Corey Bros. for \$28,000. We borrowed the money from the bank from time to time, and would take up one note and give another one at different times. It might be that I got money on my individual note; I don't remember. We left our bank stock as security. I can't recollect the dates of the notes, but I know that we borrowed for the company

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there. I think the aggregate was something like \$28,000. The company failed in the fall of 1892, about October or November. We owed the First National Bank at that time in the neighborhood of \$70,000. We gave them good real-estate security as far as it went. I did not make any effort to get security for the Citizens' Bank. I did not borrow \$8,000 of them after we failed. As president of the bank, I believe I was elected as a director of the Cache Valley Land & Canal Company. I did not know anything about the canal company transaction. The truth is I was only nominal president of the bank. I presided at meetings, and every day I was in the city I looked around after the interests of the bank. I was interested in the Junction City Driving-Park Association, and was president of it. I don't know much about the loans or overdrafts of the driving-park association. I don't know whether or not the directors approved of the loans to the Anderson Pressed-Brick Company. I knew in a general way that they were making loans. I did not know anything about the details of the loans at the time they were made. I wasn't manager or anything of that kind. I couldn't tell you how many meetings I presided over. I never missed a meeting while I was in the city, that I know of. Sometimes they held two or three meetings a month, and sometimes one." The defendant Schramm, another director, gave testimony as follows: "I was a stockholder from the inception of this bank down to December, 1893. I was generally at all of the meetings of the directors of the Citizens' Bank. I couldn't say how many meetings I would attend during the year. I had a very slight acquaintance with Barbour. The directors requested him to furnish a bond shortly after the bank was organized. The directors that were meeting at that time were Corey, Robison, Cahoon, Keck, Wurtelle, and Robinson. I can't think of the others. I did not make a personal examination of the books of the bank during the administration of Barbour. I knew about the Corey loan when it was made. I can't give you the date. After they went to

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the wall, the manager was requested by the directors to get what security he could for the claim. I didn't know when the \$10,000 loan was made to the canal company. I knew nothing at all of the transaction until after it was completed. I can't remember when I first learned of the transaction. I remember Kuhn saying: 'Come over to the bank; there is a loan there we want to consider.' We went over, and told Robison that, if there was anything being loaned where the bank would become indebted, we wanted him to fix up security for the bank. This was some time in the summer of 1893. I don't understand the bank style of bookkeeping. I was one of the executive committee after January, 1893. I did the best I could as director. The duties of the executive committee were passing upon the loans and the property, and the general management of the bank. We didn't consent to any loans after I became one of the executive committee." The witness knew of the various transactions complained of, and had confidence in the manager and cashier. The defendant Brough was cashier, and some of his statements in his testimony are as follows: "I was nominally cashier of the Citizens' Bank. I don't consider that I performed all the duties of a cashier, because there was a manager of the bank. He performed many of the duties that a cashier would perform if there was no manager. I was not selected as manager. I was elected at a board meeting of the directors to act as cashier, at a salary. I consider that when I went into the bank I made a contract with the directors restricting my liability. They made a contract with me that I was not to be charged with responsibility or charged with passing upon securities. That contract was in writing. With it is a proposition from six of the directors asking me to become cashier. I was a member of the Cache Valley Land & Canal Company. I did not make a loan to that company. I did know of a loan being made to the company. Mr. Robison made the loan. I did not know of it until evening came,

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and we made up our books. I did not find that the cash was \$10,000 short. There was a copy of the note that was sent to Chicago lying among the checks and deposit slips. The note was taken in favor of the bank. I saw the note after it came back from Chicago. Mr. Robison sent it. It was returned on the 12th day of June. It was charged to our account on the eighth day. This was in the year 1893. Prior to the returning of the note from Chicago, no minute entry was made upon the books of the bank, because there was a copy of the note in the pouch." When the bank made its assignment, the witness became the assignee.

The evidence presented in the record is quite voluminous, and further reference, in detail, is not deemed necessary. A careful examination of all the proof impels the conclusion that, at least, some of the transactions of which the plaintiffs complain are, to say the least, not such as discreet business men ought to consummate. The overdrafts and loans to officers, the large loans to individual borrowers, in some instances without security, as shown by the evidence, are of such a character as ought to have suggested to the directors the depletion of the vaults of the bank and the working of its ruin. Some of the directors, as is indicated by their statements on the witness stand, seem to have acted upon the theory that, by the appointment of executive officers in whom they had confidence and who were reputed honest, they discharged their duties as directors, and that the burdens and responsibility of management and supervision were then shifted to such officers. As we have seen, such is not the law. The directors were not mere ornaments to the bank to lure public confidence. When they became directors, the law cast upon them the important duties of supervision and direction, which they could not delegate to the executive officers; and therefore the stockholders and depositors had the right to intrust the institution with their money, in confidence that the directors would perform those duties. When sued for losses which

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resulted from careless or unlawful acts and unfortunate transactions, they can never set up as a defense that they did not examine the books or accounts of the bank, knew nothing about the loans or discounts, were ignorant of banking business, or that they intrusted the management and supervision of the business to the executive officers, in whom they had confidence. The welfare of the public and the interests of banking institutions alike forbid this.

Mr. Morawetz, in his Treatise on the Law of Private Corporations, in section 554, says: "Directors are not merely bound to be honest; they must also be diligent and careful in performing the duties which they have undertaken. They cannot excuse imprudence on the ground of their ignorance or inexperience, or the honesty of their intentions; and, if they commit an error of judgment through mere recklessness or want of ordinary prudence and skill, the corporation may hold them responsible for the consequences." *Marshall v. Bank*, 85 Va. 676, 8 S. E. 586.

We do not herein assume to determine the ultimate rights of the plaintiffs. Whether or not they will finally be able to recover for any of the transactions complained of will perhaps depend largely upon the question whether or not they themselves have been guilty of such acts and conduct respecting these transactions, and the management of the bank, as will prevent a recovery by them. We simply hold that the plaintiffs have established a *prima facie* case against the defendants Brough, Spencer, Murphy, Kuhn, Wells, Schramm, and Corey: and, as to them, the judgment of the court must be set aside, costs to abide the result of the action. As to defendants Robison, Maguire, Beeman, Perkins, and Armstrong, the judgment of nonsuit is affirmed, with costs against the plaintiffs. The cause must therefore be remanded to the court below, with directions to proceed in accordance herewith. It is so ordered.

CHERRY, District Judge, and BASKIN, J. concur.

Note

Liability of Directors for Negligence in Supervision of Business.—The ordinary care and prudence that directors of national banks must exercise includes something more than officiating as mere figureheads. They are, however, entitled to commit the business of the bank to its duly authorized officers; but this does not absolve them from the duty of reasonable supervision, nor are they to be permitted to be shielded from liability because of want of knowledge of wrong doing, if that ignorance is the result of gross inattention. *Briggs v. Spaulding et al.* 141 U. S., 132, 33 Am. & Eng. Corp. Cas. 420.

FULLER, C. J., delivering the opinion said: In *Percy v. Millaudon*, 8 Mart. (N. S.), 68, which has been cited as a leading case for more than 60 years, the supreme court of Louisiana, through JUDGE PORTER, declared that the correct mode of ascertaining whether an agent is in fault "is by inquiring whether he neglected the exercise of that diligence and care which was necessary to a successful discharge of the duty imposed on him. That diligence and care must again depend on the nature of the undertaking. There are many things which, in their management, require the utmost diligence and most scrupulous attention, and where the agent who undertakes their direction renders himself responsible for the slightest neglect. There are others where the duties imposed are presumed to call for nothing more than ordinary care and attention, and where the exercise of that degree of care suffices. The directors of banks, from the nature of their undertaking, fall within the class last mentioned, while in the discharge of their ordinary duties. It is not contemplated by any of the charters which have come under our observation, and it was not by that of the Planters' Bank, that they should devote their whole time and attention to the institution to which they are appointed, and guard it from injury by constant superintendence. Other officers, on whom compensation is bestowed for the employment of their time in the affairs of the bank, have the immediate management. In relation to these officers the duties of directors are those of control, and the neglect which would render them responsible for not exercising that control properly must depend on circumstances, and in a great measure be tested by the facts of the case. If nothing has come to their knowledge to awaken suspicion of the fidelity of the president and cashier, ordinary attention to the affairs of the institution is sufficient. If they become acquainted with any fact calculated to put prudent men on their guard, a degree of care commensurate with the evil to be avoided is required, and a want of that care certainly makes them responsible."

Spring's Appeal, 71 Pa. St. 11, was the case of a bill filed by Spring, as assignee of a trust company, against its directors and others, to compel them to make good losses sustained by the depositors on the ground of fraudulent mismanagement of the affairs of the company; and JUDGE SHARSWOOD, speaking for the court, said: "It is by no means a well settled point what is the precise relation which directors sustain to stockholders. They are, undoubtedly, said in many authorities to be trustees, but that, as I apprehend, is only in a general sense, as we term an agent or any other bailee intrusted with the care and management of the property of another. It is certain that they are not technical trustees. They can only be regarded as mandataries,—persons who have gratuitously under-

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taken to perform certain duties, and who are therefore bound to apply ordinary skill and diligence, but no more. * * * We are dealing now with their responsibility to stockholders, not to outside parties,—creditors and depositors. It is unnecessary to consider what the rule may be as to them. Upon a close examination of all the reported cases, although there are many *dicta* not easily reconcilable, yet I have found no judgment or decree which has held directors to account, except when they have themselves been personally guilty of some fraud on the corporation, or have known and connived at some fraud in others, or where such fraud might have been prevented had they given ordinary attention to their duties. I do not mean to say by any means that their responsibility is limited to these cases, and that there might not exist such a case of negligence, or of acts clearly *ultra vires*, as would make perfectly honest directors personally liable. But it is evident that gentlemen selected by the stockholders from their own body ought not to be judged by the same strict standard as the agent or trustee of a private estate. Were such a rule applied, no gentleman of character and responsibility would be found willing to accept such places." And see *Citizens' Building L. & S. Assoc. v. Coriell*, 34 N. J. Eq. 383; *Hodges v. New England Screw Co.*, 1 R. I. 312; *Wakeman v. Dalley*, 51 N. Y. 27. It was in this aspect that LORD HATHERLEY remarked in *Land Credit Co. v. Lord Fermoy*, L. R. 5 Ch. 763: "Whatever may be the case with a trustee, a director cannot be held liable for being defrauded. To do so would make his position intolerable." And the same view is expressed by SIR GEORGE JESSEL, M. R. in his opinion in *Re Dean Coal Min. Co.*, 10 Ch. Div. 450, where he says: "One must be very careful in administering the law of joint stock companies not to press so hard on honest directors as to make them liable for these constructive defaults, the only effect of which would be to deter all men of any property, and perhaps all men who have any character to lose, from becoming directors of companies at all. On the one hand, I think the court should do its utmost to bring fraudulent directors to account; and, on the other hand, should also do its best to allow honest men to act reasonably as directors. Willful default no doubt includes the case of a trustee neglecting to sue, though he might by suing earlier have recovered a trust fund. In that case he is made liable for want of due diligence in his trust. But I think directors are not liable on the same principle." The theory of this bill is that the defendants are liable, not to stockholders nor to creditors, as such, but to the bank, for losses alleged to have occurred during their period of office, because of their inattention. If particular stockholders or creditors have a cause of action against the defendants individually, it is not sought to be proceeded on here, and the disposition of the questions arising thereon would depend upon different considerations.

In *Preston v. Prather*, 137 U. S. 604, it was ruled that gratuitous bailees of another's property are not responsible for its loss unless guilty of gross negligence in its keeping; and whether that negligence existed or not is a question of fact for a jury to determine, or to be determined by the court where a jury is waived. And, further, that the reasonable care which the bailee of another's property intrusted to him for safe keeping without reward must take, varies with the nature, value, and situation of the property, and the bearing of surrounding circumstances on its security. That was a case

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of persons engaged in the business of banking receiving for safe keeping a parcel containing bonds, which was put in their vaults. They were notified that their assistant cashier, who had free access to the vaults where the bonds were deposited, and who was a person of scant means, was engaged in speculations in stocks. They made no examination of the securities deposited with them, and did not remove the cashier. He stole the bonds so deposited: and it was held that the bankers were guilty of gross negligence, and were liable to the owner of the bonds for their value at the time they were stolen. And MR. JUSTICE FIELD, delivering the opinion, said: "Undoubtedly, if the bonds were received for safe keeping, without compensation to them in any form, but exclusively for the benefit of the plaintiffs, the only obligation resting upon them was to exercise over the bonds such reasonable care as men of common prudence would usually bestow for the protection of their own property of a similar character. No one taking upon himself a duty for another without consideration is bound, either in law or morals, to do more than a man of that character would do generally for himself under like conditions." No one of the defendants is charged with the misappropriation or misapplication of or interference with any property of the bank nor with carelessness in respect to any particular property, but with the omission of duty which, if performed, would have prevented certain specified losses, in respect of which complainant seeks to charge them.

The doctrine that one trustee is not liable for the acts or defaults of his co-trustees, and while, if he remains merely passive, and does not obstruct the collection by a co-trustee of moneys, is not liable for waste, is conceded; but it is argued that if he himself receives the funds and either delivers them over to his associates, or does any act by which they come into the possession of the latter or under his control, and but for which he would not have received them, such trustee is liable for any loss resulting from the waste, (*Bruen v. Gillet*, 115 N. Y. 10; 2 Pom. Eq. Jur. §§ 1069, 1081,) and that this case comes within the rule as thus qualified. Treated as a cause of action in favor of the corporation, a liability of this kind should not lightly be imposed in the absence of any element of positive misfeasance, and solely upon the ground of passive negligence; and it must be made to appear that the losses for which defendants are required to respond were the natural and necessary consequence of omission on their part. And in this connection the remarks of MR. JUSTICE BRADLEY in *New York Cent. R. Co. v. Lockwood*, 17 Wall. (U. S.), 357, 382, may well be quoted: "We have already adverted to the tendency of judicial opinion adverse to the distinction between gross and ordinary negligence. Strictly speaking, these expressions are indicative rather of the degree of care and diligence which is due from a party, and which he fails to perform, than of the amount of inattention, carelessness, or stupidity which he exhibits. If very little care is due from him, and he fails to bestow that little, it is called 'gross' negligence. If very great care is due, and he fails to come up to the mark required, it is called 'slight' negligence. And if ordinary care is due, such as a prudent man would exercise in his own affairs, failure to bestow that amount of care is called 'ordinary' negligence. In each case the negligence, whatever epithet we give it, is failure to bestow the care and skill which the situation demands, and hence it is more strictly accurate, perhaps,

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to call it simply 'negligence.' And this seems to be the tendency of modern authorities. If they mean more than this, and seek to abolish the distinction of degrees of care, skill, and diligence required in the performance of various duties and the fulfillment of various contracts, we think they go too far, since the requirement of different degrees of care in different situations is too firmly settled and fixed in the law to be ignored or changed." In any view the degree of care to which these defendants were bound is that which ordinarily prudent men would exercise under similar circumstances, and in determining that the restrictions of the statute and the usages of business should be taken into account. What may be negligence in one case may not be want of ordinary care in another, and the question of negligence is therefore ultimately a question of fact, to be determined under all the circumstances. The alleged liability of the defendants is such that the facts must be examined as to each of them.

In *Swentzel et al. v. Penn Bank et al.* (Pa.), 37 Am. & Eng. Corp. Cas. 642, it was held that the law does not hold the directors of a bank to the same care which an individual ordinarily takes of his own business; they are only required to exercise the ordinary care which bank directors usually exercise and are only liable for fraud or for such gross negligence as amounts to fraud. In determining what is such ordinary care regard must be had to the usages of the business. If a director performs his duties in the same manner as they are performed by the directors of all other banks in the same city he is not guilty of gross negligence. See also *Williams v. McKay* (N. J.), 11 Am. & Eng. Corp. Cas. 613.

In *Robinson v. Hall*, 59 Fed. Rep. 648, it was held that directors of national banks will not be held personally liable unless in case of active or passive fraud or extreme negligence. The court said: "Mere neglect to fully inform themselves of the affairs of the bank, even to the extent that they could be ascertained by an inspection of its books, is not held to be gross negligence, unless, perhaps, in cases where grounds of suspicion of the good conduct of their officers exist, and have come to their knowledge, or may reasonably be supposed to have been known to them. They are pecuniarily interested as stockholders in the faithful conduct of their officers, and it would be considered unjust for any slight reason to hold them further liable to what in many cases would be the total ruin, by liability for the losses of the bank in case of its failure."

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LAMSON *et al.*

v.

BEARD.

C. B. CONGDON & CO. v. SAME. PHELPS *et al.* v.
SAME.

(*Circuit Court of Appeals, Seventh Circuit, May 19, 1899.*)

Review—Special Findings—Evidence.—It is immaterial whether there was error in admitting evidence of irrelevant or immaterial facts stated in special findings.

Misuse of Bank's Draft by President Having Apparent Authority.—If the directors of a bank authorize its president to use its drafts for his individual purposes, whether paid for at the time or not, any loss resulting from a misuse of such authority should fall upon the bank, rather than upon a third person, who in good faith has paid value for a draft of the bank wrongfully used by its president; and the question of good faith should be determined by the ordinary rules applicable to the transfer of mercantile paper.

Same—Drawee—Inquiry.*—A creditor receiving a draft purporting to be the draft of a bank, drawn by its president, and sent by the latter in discharge of his individual liabilities, must at his peril inquire of the bank's directors whether the president had authority to draw the draft for such purpose.

Special Findings—Embezzlement—Bookkeeping.—In an action to recover the proceeds of the drafts of a bank wrongfully used by its president to discharge an individual liability, a special finding of such wrongful and unauthorized appropriation cannot be overcome by proof of entries on the bank's books disclosed by the special findings which, even if honestly made, would amount only to evidence tending to show that the bank was paid for the drafts.

Embezzlement by President—Whether Bank Chargeable with President's Knowledge.†—The knowledge of the president of the bank of his own frauds in using the bank's funds to discharge his individual liabilities was not attributable to the bank.

President Wrongfully Using Bank's Draft—Drawee—Inquiry.—A creditor receiving a draft purporting to be the draft of a bank, but wrongfully drawn by its president in discharge of his individual liabilities to such creditor, is not a purchaser in good faith, but is put upon notice of the president's lack of authority to draw upon the funds of his bank for his individual purposes; and the bank's receiver may compel such creditor to refund the proceeds of the

*See note at end of case.

†See notes, 1 Banking Cases 23 *et seq.*

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draft where they have been wrongfully appropriated by the president, and received by the creditor.

President Using Authority in His Own Behalf.—The fact that general authority has been given a bank president to use the bank's drafts in its behalf will not render the bank responsible for its drafts to a creditor of the president receiving them, where they have been wrongfully used by the president to discharge his individual liabilities to such creditor.

Commercial Paper — Bona Fide Holders — Public Policy.—The drafts of a bank wrongfully used by its president to discharge his individual debt, when received by his creditor, are not commercial paper, capable of treatment as money, and the considerations of public policy on which the *bona fide* holder of such paper is protected, even though the rights of an antecedent holder be questionable, have no application.

President Using Bank's Drafts in His Own Behalf — Drawee — Inquiry.—Where it is apparent on the face of drafts, used by the president of a bank in discharge of his individual debts, that they are drawn on the funds of the bank, his creditor cannot receive them without being bound at his peril to inquire of the bank's directors whether the president had authority to use them for such purpose; and the contention that if he "had authority to draw drafts to his own or his creditor's order, upon payments by him to the bank for the same," the fact of drawing such drafts was a representation, on which the creditor receiving them had a right to rely, that such payments had been made, is without merit.

Issues.—The question of gambling was not an issue in the case.

ERROR by defendants to the Circuit Court of the United States for the Northern Division of the Northern District of Illinois. *Affirmed.*

These are actions of assumpsit, brought by Robert R. Beard, as receiver of the First National Bank of Pella, Iowa, to recover of the respective plaintiffs in error, who are commission merchants at Chicago, the proceeds of drafts of the bank, drawn in their favor and delivered to them by E. R. Cassatt, then president of the bank, in discharge of individual liabilities incurred in transactions conducted by them for him on the board of trade at Chicago.

Case Stated.

The plaintiffs in error in the first case are co-partners under the name of Lamson Bros. & Co.; in the third case, under the name of Milmine, Bodman & Co.; and in the second case C. B. Congdon & Co. is the name of a corporation. The declaration in each case contains the customary common counts, and also special counts, to which the drafts therein sued upon are

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made exhibits. Plea in each case, non assumpsit; and in the first case a trial by jury. The errors assigned in that case have reference to the giving and refusing of instructions. The evidence is in the record, and is without substantial conflict. The drafts, of which there were ten, were all drawn upon a lithographed or printed form, and, excepting dates and amounts, are like the first, which reads as follows:

“First National Bank.

“Pella, June 27, 1892.

“Pay to the order of Lamson Bros. & Co. \$400, four hundred dollars.

“E. R. Cassatt, Pt.

“To National Bank of Illinois. Cashier.”

The word “Cashier” is in print, and the letters “Pt.,” opposite the name of Cassatt, were written by him to indicate his office as president of the bank. He sent the drafts by mail to Lamson Bros. & Co., in response to their demands, in order to maintain his margins, and in each instance they acknowledged receipt by a letter addressed to Cassatt individually. In their letter of December 20, 1893, they say, “Your account has credit for \$200, received from First National Bank of your city,” and in that of January 22, 1894, they say: “We received today from the First National Bank of your city their favor of the 20th instant, containing draft for \$400, which we have credited to your account.”

Under the court’s charge, which upon the main question in the case followed the opinion of JUDGE WALLACE in *Anderson v. Kissam*, 35 Fed. 699, the jury returned a verdict, upon which judgment was entered in favor of the plaintiff for the sum of \$3,588. of which it is conceded the sum of \$688 was for interest. In support of the court’s charge there have been cited (in addition to *Anderson v. Kissam*, *supra*) *Chrystie v. Foster*, 9 C. C. A. 606, 61 Fed. 551; *Moore v. Bank*, 15 Fed. 141; *Id.*, 111 U. S. 156, 4 Sup. Ct. 345; *Claffin v. Bank*, 25 N. Y. 293; *Gerard v. McCormick*, 29 N. E. 115, 130 N. Y. 261; *Wilson v. Railway Co.*, (N. Y. App.) 24 N. E. 384; *Shaw v.*

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Spencer, 100 Mass. '384; Bank v. Wagner, (Ky.) 20 S. W. 535. *Per contra*, the plaintiffs in error have cited Goshen Nat. Bank v. State, 141 N. Y. 379, 36 N. E. 316; Bank of New York Nat. Banking Ass'n v. American Dock & Trust Co., 143 N. Y. 564, 38 N. E. 713; Hanover Nat. Bank v. Same, 148 N. Y. 612, 43 N. E. 72; Kissam v. Anderson, 145 U. S. 435, 12 Sup. Ct. 960. This case was argued at the October session, 1898, JUDGE SHOWALTER with the other circuit judges composing the court. In each of the other cases a trial by jury was waived by written stipulation, and the court made a special finding of facts, based in the main upon an agreed statement of the parties, and gave judgment for the plaintiff.

The findings in No. 555 are as follows:

"First. The plaintiff was before and at the time of the commencement of this suit, and is now, the receiver, duly appointed by the comptroller of the currency, of the First National Bank of Pella. The plaintiff was at the time of the commencement of this suit, and is, a citizen of the state of Iowa.

"Second. The defendant C. B. Congdon & Co. is a corporation organized under the laws of the state of Illinois, having its principal place of business in Chicago, in the Northern division of the Northern district of said state. Said corporation is a resident and citizen of the state of Illinois, and of the Northern division of the Northern district thereof, and was so organized and incorporated, and was such resident and citizen, at the time of the commencement of this suit.

"Third. The said First National Bank of Pella is situated at Pella, a town of about 3,000 inhabitants, in the midst of a farming community, and was organized in 1871, under the banking laws of the United States, with a capital stock of \$50,000. E. R. Cassatt was the principal person engaged in its organization, and after the year 1883, together with his relatives, owned a majority of the stock, all of which was controlled by Cassatt. From the time of the organization of the bank to its failure Cassatt was

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president, and the principal executive officer of the bank, and enjoyed in a high degree the confidence of its stockholders and of the people of Pella and of the surrounding country. Subsequent to 1881 the management of the bank was entirely under the control of E. R. Cassatt. The board of directors performed their duties largely in a perfunctory manner, and their knowledge as to the affairs of the bank was derived almost exclusively from the statements made to them by Cassatt. Cassatt dictated the persons to whom loans should be made, and had the entire discretion as to the acceptance of all bills receivable which became part of the assets of the bank. The method by which the affairs of the bank were conducted, the duties which the clerks performed, the manner of selling exchange, and the other executive methods of the bank were devised by said Cassatt, and carried on under his directions, without interference from the directors. The board of directors reposed implicit confidence in Cassatt, and accepted his statements as true in regard to all the affairs of the bank, and made no examination of the bills receivable to ascertain whether they were spurious or not. Cassatt had charge of the bills receivable of the bank and of the cash chest. Cassatt was accustomed, from the organization of the bank down to the time of its failure, to draw drafts on the funds of said bank on deposit in other banks, signing such drafts in the name of himself as president. The affairs of the bank were examined twice a year by the examiner appointed by the comptroller of the currency of the United States. At the time of such examinations Cassatt was accustomed to exhibit to the examiner the bills receivable and the cash on hand, and then return them to the safe. At such times the proper amount of cash was on hand and such bills receivable as the books of the bank showed to be on hand. The balance of the stock of the bank, outside of Cassatt's holdings, were held in small amounts, the average being about \$2,000 of stock (at its par value).

"Fourth. The said First National Bank of Pella

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went into the hands of a receiver June 25, 1895. At the time of its failure it was for the first time ascertained by its stockholders, and by the other officers, that said Cassatt was a defaulter to the bank in the sum of about \$65,000. Such sum had been taken by Cassatt, from time to time, from the moneys of the bank, and had been concealed by means of forged, spurious, and other fictitious notes; other evidences of loans having been put into the bank by Cassatt. The forged and fictitious notes were so adroitly executed that there was nothing that would suggest to the ordinary observer that the notes were not genuine, as they purported to be. The said Cassatt has since that time been duly indicted, tried, and convicted for the embezzlement of said \$65,000, and is now serving his sentence on account of such conviction.

“Fifth: The said Cassatt began to have business dealings with C. B. Congdon & Co., a firm consisting of C. B. Congdon and A. C. Davis, commission merchants on the Board of Trade in the city of Chicago, in 1894, continuing to have such transactions down to and including a portion of September, 1894. On or about September 24, 1894, the defendant corporation of C. B. Congdon & Co. was duly organized under the laws of the state of Illinois and authorized to begin business. On said September 29, 1894, said corporation duly purchased the good will and property of the said firm of C. B. Congdon & Co. and of the firm of A. C. Davis & Co., said A. C. Davis being a member of both firms. The stockholders of said corporation were, and at the time of said transaction continued to be, and still are, the same men who constituted the firm of C. B. Congdon & Co. and the firm of A. C. Davis & Co. The officers of said corporation, at the time of its organization and at the time the drafts were made in the suit here, were C. B. Congdon, president; A. C. Davis, vice president; William S. Warren, secretary; Charles H. Hulburd, treasurer,—the said C. B. Congdon being the same C. B. Congdon who belonged to the previous firm of

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C. B. Congdon & Co., and the said A. C. Davis being the same A. C. Davis who belonged to the firm of C. B. Congdon & Co. The directors of said corporation were at the beginning, and have ever since continued to be, C. B. Congdon, A. C. Davis, C. H. Hulburd, William S. Warren, and E. A. Lancaster. From the time said corporation of C. B. Congdon & Co., was organized the said Cassatt continued his dealings, formerly had with C. B. Congdon & Co., with the said corporation. The said dealings with the said corporation and its predecessor, C. B. Congdon & Co., were substantially as follows: The said Cassatt would, either personally or by wire, direct the said corporation or firm to purchase or sell certain futures in either wheat, oats, or provisions, which said direction would be executed by the corporation on the Chicago Board of Trade by buying of or selling to some other broker on such board the futures stipulated. Such purchases or sales would thereupon be carried by said corporation or firm in the name of and for the benefit of said Cassatt until another order was received by Cassatt closing out the same, either by purchase or sale, as the case might be. Under the rules of the Board of Trade the corporation or firm would have been obliged to have delivered, in case of sales, or accepted, in case of purchases, from the brokers with whom they had transactions, the cereals or provisions in question when the deals matured, and the said Cassatt would have been obliged to have taken or delivered to the corporation or firm the cereals or provisions called for in such deals at the time they would have matured. As a matter of fact, however, none of the sales made by the corporation or firm on account of Cassatt ever resulted in the delivery of any grain or provisions, and none of any of the purchases made on his account ever resulted in obtaining, or the acceptance of, any grain or provisions. The deals were, in nearly every instance, closed before the future to which they related had arrived, and without the passing or intention to pass of any actual grain or provisions.

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All the transactions of Cassatt with the said corporation or firm were intended by him to be purely speculative transactions in futures on the Board of Trade, and were so understood by the said corporation or firm, and none of the said transactions contemplated the purchase or sale of grain or provisions with any other purpose than the subsequent disposal of the same without the actual delivery or acceptance of the grain or provisions involved. The purchases and sales were numerous, and represented, in the aggregate, a large amount of dealing. The defendants and the firm were protected from losses by margins put up from time to time with them by said Cassatt for that purpose. The general course of said speculation was unfavorable to Cassatt. He occasionally had some profits, but more frequently suffered losses. The whole course of the transactions would have disclosed to an ordinary observer, fully informed of the facts, that Cassatt was gradually losing, and that some funds owned or controlled by him must have been gradually eaten into by the losses from time to time incurred and the margins put up. The defendants themselves must have known this prior to and at the time they received the drafts sued upon, unless they willingly suffered themselves to be deceived.

"Sixth. The said Cassatt, in order to carry on his deal with the said firm and defendants, kept two accounts in the said First National Bank of Pella, one in his own name, and the other in the name of E. R. Cassatt & Co. During the period of said deals Cassatt remitted to the said firm, on account of the margins aforesaid, from time to time, drafts similar to the drafts sued on in these cases, including the drafts sued upon; that is to say, the drafts signed by the First National Bank of Pella, by E. R. Cassatt, president, drawn upon the National Bank of Illinois, and payable to the firm. These drafts drawn upon the firm of C. B. Congdon & Co. bore the dates, and were for the amounts, as follows: 1894: January 10th, \$400; January 24th, \$200; February 10th, \$500; February

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16th, \$600 ; April 25th, \$500 ; May 12th, \$500 ; May 15th, \$500 ; May 17th, \$1,100 ; July 18th, \$600 ; July 20th, \$400. Also, there were sent to the defendant the corporation of C. B. Congdon & Co. drafts as follows: 1894 : October 3d, \$2,000. 1895 : January 23d, \$2,000. Said drafts, having been received by the said firm of C. B. Congdon & Co. and the said corporation of C. B. Congdon & Co., and credited to the said Cassatt on their books, respectively, were indorsed on the back by the said firm of C. B. Congdon & Co. and the said corporation of C. B. Congdon & Co., respectively, and deposited to the credit of their account in their bank of deposit in Chicago, the Corn Exchange Bank, by which bank they were passed to the National Bank of Illinois, and charged by said last-named bank to the First National Bank of Pella. Such drafts were, at a date subsequent to their issue, duly credited to said National Bank of Illinois, and charged to some account on the books of said Pella Bank having a credit balance appearing upon said books of sufficient amount to pay or offset such charges, except, however, in so far as the facts stipulated in this paragraph may be modified by the following statement, to wit, that at the time of the failure of the Pella Bank the books of said National Bank of Illinois showed that drafts to the amount of \$3,000 had been drawn by said Pella Bank upon said National Bank of Illinois and not credited to it upon the books of said Pella Bank.

“Seventh. None of said drafts were used or intended to be used to pay off any debt or obligation of said bank, but all were used to supply the margins in the private transactions of the said Cassatt with the said firm of C. B. Congdon & Co. and said corporation of C. B. Congdon & Co., as aforesaid. Said transactions were all kept secret from the bank by said Cassatt.

“Eighth. There is no evidence from either side, other than the foregoing, tending to show that the said Cassatt was or was not a man of means, independently of his holdings in the said First National Bank of Pella. Both the firm of C. B. Congdon & Co. and

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the corporation of C. B. Congdon & Co. knew that Cassatt was president of the bank, and had access to its funds, but made no inquiry as to whether said Cassatt had means, independently of his holdings in said bank, and made no inquiry of said Cassatt, the other officers of the bank, or any one else likely to know, whether said Cassatt was using his own means in the speculative transactions aforesaid, and no inquiry looking in that direction.

“Ninth. The court finds that the avails of the drafts sued upon in this case, through the means already described, were taken purposely by the said Cassatt, without authority of law, but as an act of theft and embezzlement from the funds of said bank, and that the defendants, in receiving the avails of said drafts, were in fact receiving the moneys stolen by said Cassatt from said bank. The court further finds that reasonable and prudent men, having no selfish interests to subserve, would have been led, by the facts in possession of the firm of C. B. Congdon & Co. and of the defendant, to suspect that said Cassatt might be unlawfully using the funds of said bank to supply the margins transmitted to the firm of C. B. Congdon & Co. and the corporation of C. B. Congdon & Co., respectively.

“Wherefore, the court finds the issues for the plaintiff and against the defendants, and assesses the plaintiff’s damage at the sum of \$2,323.61, of which \$2,000 is principal and \$323.61 interest.

P. S. GROSSCUP, Judge.”

In No. 561 the findings, with a change of the names of the defendants, are the same, with the following exceptions :

The fifth commences with this statement : “Fifth. The said Cassatt began to have business dealings with the defendants, commission merchants on the Board of Trade, in the city of Chicago, in 1884, continuing to have such transactions down to and including a portion of the year 1894,”—and also contains the following : “The money which was sent to Milmine, Bodman &

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Co. to pay the losses aforesaid was in turn paid out by Milmine, Bodman & Co., for the purpose of discharging the contracts made in behalf of Cassatt by them, upon which the losses occurred, and no profit resulted to Milmine, Bodman & Co. by reason of any of the dealings with Cassatt, except the commissions which they earned as brokers in negotiating the transactions for him."

The sixth, after the first sentence, proceeds as follows: "During the period of said deals, Cassatt remitted to the defendants, on account of margins aforesaid, from time to time prior to the drafts sued on in this case, 27 drafts, each of which was exactly similar to the drafts sued on in this case; that is to say, each was signed, 'First National Bank of Pella, by E. R. Cassatt, President.' All of these drafts were collected by the defendants in the same way as the drafts in the suit. The earliest of the series of drafts, prior to the drafts in suit, was August 21, 1884, and the latest was April 6, 1891. Of these drafts, there were 5 in 1884, 8 in 1885, 6 in 1886, 2 in 1887, 1 in 1888, 1 in 1890, and 2 in 1891, and were for the amounts and bore the dates as follows: 1884: August 21st, \$500; October 11th, \$300; November 19th, \$300; December 1st, \$500; December 9th, \$300. 1885: January 5th, \$200; February 19th, \$250; March 25th, \$500; April 27th, \$500; July 27th, \$425; October 5th, \$300; October 10th, \$1,500; October 15th, \$1,000. 1886: April 12th, \$1,000; April 17th, \$1,000; September 11th, \$300; September 25th, \$300; October 11th, \$300. 1887: February 19th, \$300; July 8th, \$300. 1888: December 3d, \$1,000. 1889: March 18th, \$800; April 13th, \$500. 1890: February 13th, \$500. 1891: January 6th, \$500; April 6th, \$1,000. Each of said drafts was charged by the National Bank of Illinois to the First National Bank of Pella, and monthly statements were sent by the National Bank of Illinois to the First National Bank of Pella, which were checked up by the clerks in the latter bank, but during the two years immediately preceding the failure the checking was

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done by Cassatt himself. Most of the drafts sent by E. R. Cassatt, as aforesaid, both those prior to the ones in suit, as well as the drafts sued upon in this case, except as hereinafter noted, were charged upon the books of the First National Bank of Pella, either to the account of E. R. Cassatt, or to the account of E. R. Cassatt & Co., which account, at the time of such charging, had an apparent credit balance sufficient to pay or offset the charge so made against it. Such of said drafts as were not charged to E. R. Cassatt, or to E. R. Cassatt & Co., were charged to some other account upon the books of said bank, which account, at the time of said charges, had an apparent credit balance sufficient to pay or offset the charges so made against it. Said drafts were all signed by E. R. Cassatt as president. The drafts sued on in this case were all drawn upon the National Bank of Illinois, payable to Milmine, Bodman & Co., and signed 'First National Bank of Pella, by E. R. Cassatt, President,' and were of dates and amounts as follows: 1891: August 20th, \$1,400; August 31st, \$800; September 19th, \$500. 1892: June 13th, \$2,000; August 27th, \$1,000; September 5th, \$1,000; October 22d, \$1,000; October 28th, \$1,000. 1893: January 30th, \$1,000; February 14th, \$600; February 18th, \$1,500; March 13th, \$600; June 21st, \$2,500; November 23d, \$300; December 21st, \$500. 1894: January 24th, \$300; February 10th, \$500; February 12th, \$600."

And the seventh contains the following additional statement: "The telegraphic correspondence between said Cassatt and the defendants was carried on in cipher. On one occasion the defendants failed to observe this cipher, and on a protest from said Cassatt promised that such oversight should not occur again. It is not unusual, however, for Board of Trade commission men to communicate with their customers in cipher. The cipher used in this case was the so-called 'Robinson Cipher.' Nearly every dealer in the country has a copy of this. The telegrams were neither signed nor addressed in cipher, but were addressed and

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signed by the correct names of the respective parties."

In No. 555 the following propositions and the authorities cited are relied upon:

(1) "There was nothing in the form of the draft sued on to create a suspicion that Cassatt was using the funds of the bank in the payment of his individual indebtedness. Goshen Nat. Bank v. State, 141 N. Y. 179, 36 N. E. 316; Claflin v. Bank, 25 N. Y. 297; Bank of New York Nat. Banking Ass'n v. American Dock & Trust Co., 143 N. Y. 564, 38 N. E. 713; Huie v. Allen (Sup.) 34 N. Y. Supp. 577; Dike v. Drexel (Sup.) 42 N. Y. Supp. 985; Goodman v. Simonds, 20 How. 364; Bank of Edgefield v. Farmers' Co-op. Mfg. Co., 2 C. C. A. 637, 52 Fed. 98-103; Bank v. Holm, 19 C. C. A. 94, 71 Fed. 489; Kaiser v. Bank, 24 C. C. A. 88, 78 Fed. 281; Anderson v. Kissam, 35 Fed. 699; Kissam v. Anderson, 145 U. S. 435, 12 Sup. Ct. 960."

(2) "The directors of the Pella Bank were guilty of culpable negligence, which far outweighed any slight negligence of defendant."

(3) "The course of dealing between the bank and the defendant, and its predecessor firm of the same name, created a presumption, upon which defendant could rely, that the draft sued on was properly obtained by Cassatt, and that the defendant was entitled to receive its avails in payment of a debt due from Cassatt. There was implied authority for his act. Martin v. Webb, 110 U. S. 7, 3 Sup. Ct. 428; Hanover Nat. Bank v. American Dock & Trust Co., 148 N. Y. 612, 43 N. E. 72."

(4) "Cassatt paid for the draft by the use of the credits the bank had given him. He defrauded the bank in his obtention of the credits, but that was another transaction. So long as the credits subsisted, they could, as between the bank and the defendant, be used as they were used. Wilson v. Railway Co. (N. Y. App.) 24 N. E. 384."

(5) "Assuming, *arguendo*, that the form of the draft was such as ought to have created suspicion that Cas-

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satt might be improperly using the funds of the bank in payment of his individual debt, and that the defendant was charged with the duty of inquiry, and made none, it is only chargeable with a knowledge of such facts as it would have learned by the exercise of ordinary diligence. *Birdsall v. Russell*, 29 N. Y. 220; *Woolen Mills v. Sibert*, 81 Ala. 140, 1 South. 773; *Knapp v. Bailey (Me.)* 9 Atl. 122."

In No. 561 the following:

(1) "The defendants were under no duty to inquire into the facts of transactions anterior to, and entirely separate and distinct from, the transactions to which they were parties."

(2) "The court erred in entering judgment against the defendants, when the findings showed that Cassatt had paid the bank for everyone of the drafts. *Goshen Nat. Bank v. State*, 141 N. Y. 379, 36 N. E. 316; *Wilson v. Railroad Co.*, 120 N. Y. 145, 24 N. E. 384; *Hanover Nat. Bank v. American Dock & Trust Co.*, 148 N. Y. 612, 43 N. E. 72; *Cowing v. Altman*, 71 N. Y. 435; *Railway Co. v. Sprague*, 103 U. S. 756."

(3) "The fact that the bank had allowed Cassatt, for a period of seven years prior to the dates of the drafts in suit, to draw drafts in a manner exactly like the manner in which he drew the drafts sued on, established a course of dealing which estops the bank to deny that Cassatt had a right to act according to this established course. *Bronson's Ex'r v. Chappell*, 12 Wall. 681; *Martin v. Webb*, 110 U. S. 7, 3 Sup. Ct. 428; *Merchants' Bank v. State Bank*, 10 Wall. 604; *Hooe v. Oxley*, 1 Wash. (Va.) 19; *McDonnell v. Bank*, 20 Ala. 313; *Martin v. Manufacturing Co.*, 9 N. H. 51; *Weaver v. Ogletree*, 39 Ga. 586; *Railroad Co. v. Schuyler*, 34 N. Y. 30; *Hanover Nat. Bank v. American Dock & Trust Co.*, 148 N. Y. 612, 43 N. E. 72."

(4) "One who receives a bank draft, fair on its face, signed by the officer duly authorized to sign drafts, may take it as currency, even though he receives it from the officer who signs it, and in payment of the latter's debt. *Goshen Nat. Bank v. State*, 141 N. Y.

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379, 36 N. E. 316 ; Goodman v. Simonds, 20 How. 343 ; Railroad Co. v. Schuyler, 34 N. Y. 30 ; Bank of Edgefield v. Farmers' Co-operative Mfg. Co., 2 C. C. A. 637, 52 Fed. 98 ; Swift v. Smith, 102 U. S. 442."

(5) "Even if Milmine & Co. had inquired, they could not possibly have found out the secret reasons existing between Cassatt and the bank why it was improper for Cassatt to draw these drafts."

Per contra, for the defendant in error, the following :

(1-3) Questions of practice.

(4) "The receipt by the plaintiff in error of the drafts of the Pella National Bank signed by Cassatt in his official capacity, to be used as margins for his personal trades, put the plaintiffs in error upon notice that Cassatt was using the bank's funds without authority, and plaintiffs in error took such drafts at their peril, and are accountable to the receiver for the avails thereof. (a) The distinction asserted in counsel's brief as to this point does not exist. Hanover Nat. Bank v. American Dock & Trust Co., 148 N. Y. 612, 43 N. E. 72 ; Moores v. Bank, 15 Fed. 141 ; *Id.*, 111 U. S. 156, 4 Sup. Ct. 345 ; Trust Co. v. Boynton, 19 C. C. A. 118, 71 Fed. 797 ; Gerard v. McCormick, 29 N. E. 115, 130 N. Y. 261 ; Anderson v. Kissam, 35 Fed. 699, 703. (b) The form of these drafts put plaintiffs in error upon notice. Anderson v. Kissam 35 Fed. 699, 703 ; Chrystie v. Foster, 9 C. C. A. 606, 61 Fed. 551 ; Moores v. Bank, 15 Fed. 141 ; *Id.*, 111 U. S. 156, 4 Sup. Ct. 345 ; Claflin v. Bank, 25 N. Y. 293 Gerard v. McCormick, 29 N. E. 115, 130 N. Y. 261 ; Wilson v. Railway Co., 24 N. E. 384, 120 N. Y. 145 ; Shaw v. Spencer, 100 Mass. 382, 384 ; Bank v. Wagner (Ky.) 20 S. W. 535 ; Trust Co. v. Boynton, 19 C. C. A. 118, 71 Fed. 797. (c) The defect appearing upon the face of the drafts, the doctrine of Bank of Edgefield v. Farmers' Co-op. Mfg. Co. and Goodman v. Simonds, cited by plaintiffs in error, does not apply. (d) The circumstances of the case of Goshen Nat. Bank v. State were radically different from that at bar. (e) The fact

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that by common usage bank drafts are treated as cash, if that be a fact, cannot be availed of by one who receives the bank's draft, signed by the president, in payment of the president's debt, to relieve the recipient from the operation of the rule that he who knowingly receives from an agent, and on the agent's account, that which belongs to the principal, does so at his peril. *Anderson v. Kissam*, 35 Fed. 699, 703; *Shaw v. Spencer*, 100 Mass. 384; *Moore v. Bank*, 15 Fed. 141; *Id.*, 111 U. S. 156, 4 Sup. Ct. 345."

(5) "Having failed to make inquiry, the plaintiffs in error are bound by the actual facts as they existed, and will not be heard to contend that inquiry would have been unavailing. *Shaw v. Spencer*, 100 Mass. 384; *Trust Co. v. Boynton*, 19 C. C. A. 118, 71 Fed. 797; *Manufacturing Co. v. Whitehurst*, 19 C. C. A. 130, 72 Fed. 502."

(6) "The course of dealing between the bank and plaintiffs in error did not create a presumption, upon which the plaintiffs in error could rely, that the draft sued upon was properly obtained by Cassatt, and that the plaintiffs in error were entitled to receive its avails in payment of a debt due from Cassatt. There was no implied authority for his act. *Chrystie v. Foster*, 9 C. C. A. 606, 61 Fed. 551; *Anderson v. Kissam*, *supra*; *Wright's Appeal*, 99 Pa. St. 425; *Hill v. Publishing Co. (Mass.)* 28 N. E. 142; *Powell v. Rogers*, 105 Ill. 318; *Berwind v. Schultz*, 25 Fed. 912; *Clews v. Bardon*, 36 Fed. 617; *Briggs v. Spaulding*, 141 U. S. 131, 11 Sup. Ct. 924; *Percy v. Millaudon*, 8 Mart. (N. S.) 68, 74, 75."

(7) "The court found, in effect, that the transactions on account of which these drafts were forwarded were gambling deals. Therefore the avails of the drafts could be recovered by the receiver, whether the brokers were or were not put on notice. (a) The finding is that neither party intended actual sales or purchases, but purely speculative transactions in 'futures.' The intent governs. *Irwin v. Williar*, 110 U. S. 499, 4 Sup. Ct. 160; *Boyd v. Hanson*, 41 Fed. 174; *Insur-*

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ance Co. v. Watson, 30 Fed. 653; Kirkpatrick v. Adams, 20 Fed. 287; Embrey v. Jemison, 131 U. S. 336, 9 Sup. Ct. 776; 2 Benj. Sales (6th Am. Ed.) 828. (b) The broker is *particeps criminis*. Irwin v. Williar, 110 U. S. 499, 510, 4 Sup. Ct. 160. (c) The intent is a question for the jury (in this case for the court to find, as a question of fact). Kirkpatrick v. Adams, 20 Fed. 287. (d) A principal may recover moneys gambled away by his agent. McAllister v. Oberne, 42 Ill. App. 287; Smith v. Ray, 89 Ga. 838, 16 S. E. 90; Mason v. Waite, 17 Mass. 560; Corner v. Pendleton, 8 Md. 337; Caussidiere v. Beers, 41 N. Y. 198, 1 Abb. Dec. 333; Burnham v. Fisher, 25 Vt. 514; Pierson v. Fuhrmann (Colo. App.) 27 Pac. 1015."

Charles H. Dupee, for plaintiff in error C. B. Congdon & Co.

Lockwood Honore and *John P. Wilson*, for plaintiffs in error E. H. Phelps and L. W. Bodman.

Frank H. Scott and *John H. Hamline*, for defendant in error.

Before WOODS and JENKINS, Circuit Judges, and BUNN, District Judge.

WOODS, Circuit Judge, after stating the facts, delivered the opinion of the court.

It is not important to inquire whether the court erred in admitting evidence of immaterial facts stated in the special findings. The one question upon a special finding or verdict is "of the sufficiency of the facts found to support the judgment." In determining that question, of course, every relevant and material fact found must be considered, and every irrelevant or immaterial fact rejected; and when the fact has been excluded from consideration there can remain no harm from the error of admitting the evidence by which it was established. The special findings recite many facts and circumstances which, though not irrelevant, are of an evidentiary character only. The ultimate facts on which the

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Findings—Evi-
dence.

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rights of the respective parties must be determined are few. They are comprehended in the statement that Cassatt, being president and practically in sole control of the bank, without authority, and without the knowledge of any other officer or stockholder, discharged his individual liabilities to the plaintiffs in error, respectively, by sending them drafts of the bank, payable to their order, and drawn upon the bank's correspondent in Chicago, with which it had sufficient moneys out of which the drafts, after indorsement by the payees, were duly paid. Much discussion has been expended upon the effect of the form of the drafts, in connection with the use to which they were put, as notice to the payees that they were drawn without authority; but, before entering upon that inquiry, it will be well to dispose of minor contentions.

Assuming that the plaintiffs in error, when the drafts were tendered them, were put upon inquiry, it is asked, what would have been the subject of inquiry? and what facts would have been developed? It is not accurate to say that the inquiry would have been, "Did Cassatt pay the bank for the drafts?" Payment for the drafts, doubtless, would have been important evidence, but not necessarily conclusive upon the true point of inquiry, which was, "Did Cassatt have authority to draw the drafts?" He might have had money in the bank, or have put it there at the time of drawing the drafts, and yet have been without authority to draw them; and without money on deposit, and without present payment, his authority to draw in the form and for the purpose proven might have been beyond dispute. If, trusting to his integrity and individual responsibility, the directors authorized him to use the drafts of the bank for his individual purposes, whether paid for at the time or not, any loss resulting from a misuse of that authority ought, of course, to fall upon the bank, rather than upon a third person, who in good faith had paid value for the paper; and the question of good faith would be determined by the ordinary

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rules applicable to the transfer of mercantile paper. The fallacy or inapplicability of the supposed case of John Doe, living at Pella, and procuring of the bank a draft payable to the order of a distant creditor, and forwarding the draft to the creditor in discharge of the debt, is evident. It is, doubtless, a not unusual practice for debtors to obtain and send to their creditors bank drafts, drawn payable to the creditors, and, of course, in every such case the creditor knows that the money of the bank is being used to pay to him the debt of another,—in the case supposed, the debt of John Doe. But in such cases the creditor may accept the draft without inquiry, not, as counsel have said, because of a presumption that the debtor had paid for the draft, but because the draft had been drawn by the authorized officer of the bank in the usual course of business, acting without apparent or known personal interest in the transaction. The receiver of such a draft, though named as payee, and on the face of the paper apparently a party to the original execution thereof, is not so in fact, but, as against the drawer, is in effect an indorsee, affected only by vices or infirmities of which he had notice before he accepted it. He might know that the draft had not been paid for, and yet take it on the assumption of regular and proper execution upon some other consideration than payment. The inquiry, therefore, which these plaintiffs in error should have made, was whether Cassatt had authority to draw drafts of the bank upon funds of the bank in possession of its correspondents for use in his individual transactions. Such an inquiry involved no difficulty beyond communicating to the directors of the bank, other than Cassatt, the fact that such a draft or drafts had been tendered in discharge of liabilities incurred in dealings upon the Board of Trade in Chicago, and asking whether the execution of the paper had been authorized. There can be little doubt what would have been the result of such an inquiry, accompanied with a frank and full statement of the facts as they were known to the payees of any of

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the drafts in suit at the time of execution. It would not have needed a discovery of Cassatt's fraudulent book-keeping to enable the directors to say whether the execution of such paper had been theretofore authorized, or then had their approval. As contended, it was clearly no duty of the plaintiffs in error to undertake an examination of the books, which, once they commenced inquiry into the management of the bank, they would have learned had been wholly in the keeping of Cassatt, and of clerks who could not be expected to testify against him. Inquiry of Cassatt, too, it is to be presumed, would have been useless, and therefore, if made, would not have met the requirement of the law. The one thing necessary to be known was whether Cassatt had authority to make the purposed use of the bank's paper. The authority could have come only from the directors, by direct resolution or by acquiescence or implied assent, and the plain, unmistakable course was to push the inquiry, wherever begun, to the source of authority.

It is a perversion of speech to say that "the findings showed that Cassatt had paid the bank for every one of the drafts," or that if the defendants had gone to Pella, and had ascertained the facts, they would have found that Cassatt was a depositor in the bank, that he had charged each draft to his account, that he had on deposit ample funds to meet the charge, that he gave due credit on the books of the bank to its Chicago correspondent for the amount of each draft, and that no step in the transaction was hidden from the bank, but was known to it and recorded in its books, and that a statement of the transactions to the bank could have caused no surprise, because the bank knew of each as it occurred during the whole period of twelve years. The entries on the books, it may be said, tended to show the facts, as stated; but the entire finding shows that Cassatt was not a depositor, and in no way made good to the bank the moneys taken from it by means of the drafts, which takings, it is expressly found, were acts of theft or

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embezzlement. That finding of the ultimate fact of wrongful and unauthorized appropriation cannot be overcome by proof of book entries, which, even if honestly made, would amount only to evidence tending to show the contrary. False entries took no money out of, and put none into, the bank; and it was not for the fraudulent bookkeeping, or forgeries, or any other wrong or series of wrongs which preceded the execution of the drafts, that the plaintiffs in error were held responsible. On the contrary, we agree that, if they are to be compelled to make restitution, it is because the particular sums which they received were wrongfully taken by Cassatt from the bank, and they were parties to the wrong. This proposition does not depend upon, and cannot be refuted by, the bookkeeping disclosed in the special finding. It embraces the three propositions contended for by counsel, namely:

“(1) The person from whom restitution is sought must have been a party to the particular transaction in which the wrong was accomplished. (2) The particular transaction to which such person was a party must have been hidden from the wronged party. (3) A mere statement to the wronged party of the facts of such particular transaction would have at once disclosed the fraud.”

While the transactions appeared upon the books, as stated in the findings, it is a misuse of words, and inconsistent with honest thought, to say that they were known to the bank. Possession of facts, in books purposely kept in a manner to conceal the truth, is not, in law or morals, knowledge of the facts. Cassatt alone had knowledge of the truth, and, though he was president, his knowledge of his own frauds, perpetrated for his individual purposes, was not attributable to the bank.

The foregoing considerations dispose of the proposition that the bank, by allowing Cassatt to make a like prior use of drafts drawn by himself, had established a course of dealing which estops the bank to deny his

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authority. Of course, an estoppel may arise out of such a course of dealing, but whether, in a particular case, it has arisen is a question of fact depending upon the circumstances. It is hardly credible that in the facts here disclosed a jury, or a right-minded court, could find an estoppel; but it is enough to say that it has not been found, and that the facts supposed to point that way which are stated in the finding do not overcome the ultimate fact stated that the sums for which these drafts were drawn were wrongfully taken by Cassatt. That is equivalent to a direct finding that he had no authority to draw and use the drafts in that way. For the same reasons the proposition that the directors of the bank were guilty of culpable negligence is unavailing. There is no finding that there was such negligence, nor, if there were, that the plaintiffs in error were influenced by it to accept the drafts, of which, on the facts known to them, Cassatt was making an improper use.

These considerations of bookkeeping, course of dealing, negligence of directors, and estoppel aside, the main question is simplified: When Cassatt tendered these drafts,—each one of them to the payee named in it in payment of an individual obligation, in which the bank was not interested,—was the taker, accepting the paper in discharge of the debt, a purchaser in good faith, or was he put upon notice of Cassatt's lack of authority to draw upon the funds of his bank for his individual purposes? Upon that question our conclusion is that the opinion in *Anderson v. Kissam*, 35 Fed. 699, is sound in principle and in accord with the weight of authority. The judgment rendered in that case, it is true, was reversed, but upon a minor point, unconnected with the main question, which there, as here, was fundamental; and the fair inference would seem to be that if the supreme court, with the question before it, had doubted the ruling and opinion below in that respect, it would not have left the question undetermined.

President Wrongfully Using Bank's Draft Drawee—Inquiry.

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The case of Goshen Nat. Bank v. State, upon which the plaintiffs in error chiefly rely, is distinguishable. The drafts in that case were drawn by the cashier, and were used to pay his individual debt; but, as the opinion is careful to state, it was "proved on the trial that the cashier had the custody and possession of the blank drafts for the claimant [the bank], and that he had the right to sign drafts drawn by the claimant on its corresponding banks, and that he had the right to draw a draft on the corresponding bank of the claimant for himself, upon the same terms that he had to draw a draft for a stranger, * * * which means," as the court assumed, "upon payment to the bank of the amount of the draft." That this proof of special authority to draw a draft for his own use was the distinguishing point of the decision is declared in the later case of Bank of New York Nat. Banking Ass'n v. American Dock & Trust Co., *supra*, where it was held that a by-law of a warehouse company, authorizing an officer of the company to sign warehouse receipts, did not authorize him to sign a receipt for his own goods. "It is an acknowledged principle of the law of agency," it was there said, "that a general power or authority given to the agent to do an act in behalf of the principal does not extend to a case where it appears that the agent himself is the person interested on the other side. If such a power is intended to be given, it must be expressed in language so plain that no other interpretation can rationally be given it; for it is against the general law of reason that an agent should be intrusted with power to act for his principal and for himself at the same time." See, also, Hanover Nat. Bank v. American Dock & Trust Co., 148 N. Y. 612, 43 N. E. 72.

It is urged, however, "that there is a clearly-defined distinction between the acts of a cashier or president of a bank, in issuing its paper, and that of any ordinary agent." There are *dicta* in some of the opinions cited which, without attempting to define it, assert in gen-

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eral terms that there is a distinction. For instance, in *Bank of New York Nat. Banking Ass'n v. American Dock & Trust Co.*, *supra*, in addition to what we have already quoted in reference to the case of *Goshen Nat. Bank v. State*, the court said: "And we also held, for the reason therein stated, that there was a difference in the case of bank or cashier's drafts from most cases of agency." There is a plain difference in the fact that such drafts, once they have been issued, are commercial paper, and may be accepted in trade and commerce without inquiry into the consideration for their issue. No other basis for a distinction is suggested in *Goshen Nat. Bank v. State*, and that difference, it is to be observed, is not in the character or extent of the agent's authority, but in the nature of the subject on which it is exercised. It is true, as there said, that "bank or cashier's drafts are used so enormously at the present time in the payment or settlement of debts, or in other commercial transactions, that they have almost acquired the characteristics of money." An officer of a bank, however, has no right to appropriate the money of the bank to his individual uses, and, though a creditor, when offered money by his debtor, ordinarily may accept it without inquiry, yet if, at the time he receives it, he is told or knows that it belongs to another, for whom his debtor is an agent or trustee, on the plainest principles he acquires no title as against the true owner. If, for instance, Cassatt had sent to the plaintiffs in error money of the bank, instead of drafts, advising them that it belonged to the bank, there could be no question of their liability to make restitution; and in what respect is their position better as presented than it would be on the facts supposed, even conceding that the drafts sent them were the same, or "almost the same," as money? The drafts bore proof on their face that they were drawn upon the funds of the bank; and that they were not drawn in the course of the bank's business but in discharge of individual liabilities of the president of the bank to themselves, they,

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of course, understood. They therefore knew that, unless there had been conferred upon Cassatt an unusual and special authority, like that given the cashier in Goshen Nat. Bank v. State, *supra*, to sign and issue drafts of the bank in his private transactions, the paper sent them was unauthorized, and that for the proceeds thereof they would be liable to the bank or its representatives.

It is evident, however, that the drafts in question, when offered the plaintiffs in error, were not commercial paper, capable of treatment as money, and that the considerations of public policy on which the *bona fide* holder of such paper is protected, even though the rights of an antecedent holder be questionable, have no application or relevancy to the case. The drafts were drawn in favor of plaintiffs in error, and until accepted by them they were not contracts, and by accepting them they did not become assignees or purchasers of existing obligations, but simply parties to the original execution thereof, into whose rights the way to full inquiry is open, unless closed by some estoppel outside of the paper itself, whatever its form. A primary party to the execution of instruments originated as these were cannot be a "*bona fide* purchaser," in the sense of the law merchant, and to hold the payee of such paper responsible for the proceeds received upon his own negotiation of it to a third party, who will be presumed to be an innocent purchaser, no more tends to discredit the paper as an agency of business, than it tends to impair the value of money as a medium of exchange to hold one who receives it wrongfully accountable to the rightful owner. If a bank president or cashier, because possessed of a general power to sign drafts, may draw drafts of the bank in favor of his individual creditor, and it is to be said that "there is nothing unusual or suspicious in this way of making the draft payable to the creditor of the cashier or president who draws it," then in *Claffin v. Bank*, 25 N. Y. 293, for all we can see, it might just as well have been said that there was nothing

Commercial Paper
— Bona Fide Hold-
ers — Public Policy.

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unusual or suspicious in the acceptance or certification by the president of the bank of a check or draft drawn by himself. The power of such an officer to draw drafts of his bank upon others is no greater than his authority to accept the checks or drafts of others upon his bank; yet in that case it was held that the general authority of the president of the bank to certify checks drawn upon it did not extend to checks drawn by himself, and it was declared not to be necessary for the principal in such case to show that the agent had acted unfairly or that he himself had sustained an injury, but that the act of the agent is deemed to be unauthorized, and the contracts void. We agree with counsel for the defendant in error that the concern of the courts should not be to make it easy for persons in fiduciary positions to make way with that which is committed to their care, by relaxing this salutary rule, through considerations of the supposed necessities of business and commerce, and that the rule should not be suspended, where the opportunities for breach of trust are largest, merely because they are large. The best public policy requires that bank officers be rigidly held to the ordinary and well-understood rule. There is, we believe, no good reason to the contrary.

In the first case, where there was a trial by jury and a general verdict, reference is made to Cassatt's own testimony for proof that he "had authority to draw drafts to his own or his creditor's order, upon payments by him to the bank for the same," and on this assumption, it is contended, on the authority of *Hanover Nat. Bank v. American Dock & Trust Co.*, and like cases, that the fact of drawing the drafts was a representation, on which the plaintiffs in error had a right to rely, that such payments had been made. Whether he had such authority was a question of fact, of which the verdict is conclusive, unless material error of law occurred at the trial. The testimony referred to is quite indefinite and uncertain, but, if it affords ground for an inference that Cassatt did in fact draw drafts to his own order,

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Bank's Drafts in
His Own Behalf—
Drawee—Inquiry.

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or in favor of his creditors, it shows no basis whatever for a belief that he did so with the knowledge of other officers of the bank. In the case last referred to there was proof that the president of the warehouse company had issued receipts to himself before the one in question, and there was evidence of facts and circumstances, sufficient to go to the jury, tending to show that he had authority to do so. It being apparent on the face of the drafts here in question that they were drawn upon the funds of the bank, it was impossible for the plaintiffs in error to receive them in discharge of Cassatt's individual obligations to themselves without being put upon inquiry whether the president had in fact the authority which he assumed to exercise; and it was not enough to make inquiry of him, nor permissible to rely upon the implied representation deducible from the execution of the drafts. That the execution of the drafts by the president of the bank in his own interest was without authority, and that the plaintiffs in error were not, and could not have been, innocent holders, the evidence was without conflict, and so clear that the court might have directed a verdict in favor of the plaintiff; and on this view of the case the other questions discussed, which in themselves are of minor importance, lose all significance. It is said that "the question of gambling was an issue in the

issues. case," and the refusal of a special request for instruction on the subject, it is urged, was material error. No such issue appears in the pleadings, and no mention of the subject is found in the court's charge to the jury. In fact, however, by necessary implication, the question was excluded from consideration when the jury was told that the plaintiff could recover only upon proof that Cassatt, without the authority, knowledge, consent, or acquiescence of the board of directors of the bank, misapplied the moneys of the bank in question to his own use, and that the defendants had knowledge, or were aware of such facts as would amount to knowledge on their part, that he was so misapplying the money of the bank; and the

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statement that the defendants must have had such knowledge was repeated in substantially the same words and with equal clearness in a separate charge. In short, the controlling question was fairly submitted to the jury, and, it is clear, was rightly decided. The allowance of interest was proper.

The judgment in each of the cases is affirmed.

NOTE.

Officer of Corporation Paying Personal Debt with Company's Securities—Notice to Purchaser.—The general rule is that one who receives from an officer of a corporation the notes or securities of such corporation, in payment of, or as security for, a personal debt of such officer, does so at his peril. *Prima facie* the act is unlawful, and unless actually authorized the purchaser will be deemed to have taken them with notice of the rights of the corporation. *Wilson v. Metropolitan R. Co.*, 120 N. Y. 145, 32 Am. & Eng. Corp. Cas. 187, 17 Am. St. Rep. 625; *Garrard v. Pittsburgh & C. R. Co.*, 29 Pa. St. 154; *Pendleton v. Fay*, 2 Paige (N. Y.), 202; *Shaw v. Spencer*, 100 Mass. 388.

MEAD

v.

PETTIGREW.

(*Supreme Court of South Dakota, April 13, 1899.*)

General Denials.—A mere general denial in an answer of every "material" allegation in the complaint is bad.

Banks—Subscription Note—Authority of President to Release Maker.*—The president of a bank in issuing shares of its stock for a negotiable note payable to the bank made an agreement with the maker that he should not be called upon to pay the note. *Held*, that the president had no authority to make such agreement, and that in an action on the note against the maker, by its *bona fide* purchaser from the bank, a verdict was properly directed for plaintiff.

Costs.—Where attention is not called to the fact that the judgment exceeds the proper amount until appellant's brief is filed, its modification will not affect respondent's costs.

APPEAL by defendant from Hughes county circuit court. *Modified.*

*See note at end of case.

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Joseph Donahue (Dillon & Sutherland, of counsel),
for appellant.

Horner & Stewart, for respondent.

HANEY, J. Plaintiff states his cause of action as follows: "(1) That the First National Bank of Ft. Pierre, South Dakota, was on January 9, 1894, and for a long time prior thereto, and until October 1, 1894, a corporation organized and existing under the laws of the United States of America. (2) That the First Bank of Ft. Pierre, South Dakota, was during all of the times hereinafter mentioned a corporation organized and existing under the laws of the state of South Dakota. (3) That on January 9, 1894, at Ft. Pierre, South Dakota, the defendant, F. W. Pettigrew, by his promissory note, promised to pay to the order of the First National Bank of Ft. Pierre, South Dakota, one thousand dollars on January 9, 1895, after date, with interest thereon at the rate of 6 per cent. per annum from maturity until paid. (4) That on or about the 1st day of October, 1894, the said First National Bank of Ft. Pierre, South Dakota, sold and delivered said note to the First Bank of Ft. Pierre, South Dakota, for a valuable consideration; that thereafter, and before the maturity of said promissory note, and on or about the 12th day of December, 1894, the said First Bank of Ft. Pierre, South Dakota, made an assignment of all its property, for a valuable consideration, for the benefit of its creditors, to this plaintiff, and among the property so assigned was the promissory note described in paragraph 3 of this complaint. (5) That this plaintiff is the owner and holder of said note, and that the defendant has not paid the same, nor any part thereof, and the same is due."

The only denial in the answer is stated thus: "That he [the defendant] denies each and every material allegation in said complaint, except as hereinafter specifically admitted." The authorities are conflicting concerning the effect of the word "material," when used as above. 1 Enc. Pl. & Prac. 782; *Dole v. Burleigh*, 1 Dak. 227, 46 N. W.

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692. We think the denial is bad, and that every material fact alleged in the complaint must, for the purposes of this action, be taken as true. Comp. Laws, § 4933.

The affirmative defenses and evidence will be considered in connection with the ruling of the court upon plaintiff's motion to direct a verdict in his favor, which was granted. In October, 1894, the assets of the First National Bank of Ft. Pierre were transferred to the First Bank of Ft. Pierre. At that time Eugene Steere was president of the former bank, and had been such officer for about four years. Mr. Steere, testifying as a witness for defendant, states that the First National Bank went out of existence October 1, 1894, when the First Bank came into existence; that the stockholders of each were practically the same; that he was promoter and organizer of the First Bank; and that he had full knowledge in regard to the notes and liabilities derived from the former corporation. Concerning the note in suit, he says: "I first saw it when it was drawn, January 9, 1894. At the time the bank was started, in 1890, we had to have five directors in the bank, and we could have only three directors who had money enough as directors, as they each had to have \$1,000 stock in the bank. So I got George Mathieson, and I have forgotten who the other was, now, but I think it was Mr. Kleiner, to act as directors; and I took their notes, and issued them stock of \$1,000, and put in the money myself, so they could act as directors, and still hold stock in the bank. Afterwards, I think, Mr. Kleiner went to Washington, and I got Mr. Pettigrew to take his place under the same. I took Mr. Pettigrew's note, and issued him the stock, and put in the money myself in the first place, and kept it for several years, until this final note was taken,—I think, about that time. Mr. Pettigrew was connected with the bank. He was connected as director of the bank, and the bank held his note, and he held his stock. During this period dividends were declared by the bank, but none received by defendant. He did

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not receive any money, but he received stock of the bank. The stock was issued to balance the note. The stock was issued for the note. When defendant gave me this note, I had this agreement, that he would not be called upon to pay it. I was president of the First Bank of Ft. Pierre from the time of its organization until the time of the assignment. I carried Mr. Pettigrew's note which represented the stock for about three years, and the bank carried it for the rest of the time. I carried the \$1,000 myself for about three and one-half years, and then the bank carried it and carried Mr. Pettigrew's note to represent the amount of money. Mr. Pettigrew got stock in the First National Bank in February, 1890, and the stock was issued to him at that time. When Mr. Pettigrew gave this \$1,000 note to the First National Bank, it was to represent the \$1,000 in money he had gotten from the bank for the stock held. He had the stock of the bank all the time the bank was in operation." Witness, on being shown Exhibit 2, and refreshing his recollection, testified that Mr. Pettigrew did not return his stock in the First National Bank of Ft. Pierre until after March 14, 1894, and that he held the stock on January 9, 1894, when he executed Exhibit A (the note in suit), and that he returned the stock after March 14, 1894, and there was stock of the First Bank of Ft. Pierre issued to him in place of the stock in the First National Bank. Mr. Pettigrew acted as director in the First National Bank of Ft. Pierre, and took part in its proceedings during all of the time the bank was in existence. Defendant, on his own behalf, testified: "I did not receive any consideration for the note sued upon. Mr. Steere came to me in Ft. Pierre one day, and said that he was in need of a director for the First National Bank, and wanted me to act as director; and I told Mr. Steere that I had no money to go into the banking business. 'Why,' he says, 'you do not need money.' 'Well,' I says, 'I don't know how to go into the banking business without money.' 'Why,' he says, 'we will have to have some local directors, and our directors are all nonresi-

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dents, and it would be a great accommodation to me if you will act.' Then he suggested I give him my note for \$1,000, and that I could act as director. When I moved away from Ft. Pierre, I told Mr. Steere that I was going back to Sioux Falls, and could be no longer of any service to him in the bank, and requested him to secure some other director, and release me from whatever obligation I might be under, and he requested that I should hold on a while; and in 1894, in answer to my various importunities, and at his request, this note was given to Mr. Steere, and he sent me the first note that was given. He requested me to return the stock in the First National Bank of Ft. Pierre, which I did, about May 12, 1894. It was agreed between Mr. Steere and me that I should never be called upon to pay the note; that the note would not be held as any part of the assets of the bank, nor as an obligation; and the stock which I held I did not consider as mine, and never received any dividends upon it, and I never paid any interest upon the note. I was never called upon to pay any assessments, and never received any dividends, upon the stock.

The foregoing statement is believed to be a fair summary of the material evidence, and, taken with the facts established by the pleadings, substantially presents the only defense attempted to be shown by defendant. Such defense has been stated as favorably to defendant as the record will permit. Upon the facts thus determined, did the circuit court err in directing a verdict for plaintiff? We think not. Plaintiff is certainly in no worse position than was the First National Bank. Steere testifies that defendant did not receive any money for the note, but he received stock of the bank. The stock was issued for the note. This stock was not returned until March 14, 1894. Defendant held it when the note in suit was executed, and when he returned it he received stock of the new bank. Steere says he carried defendant's note which represented the stock for about three years, and the bank carried it for the rest of the time. He further says, 'I

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took Mr. Pettigrew's note, and issued him the stock, and put in the money myself in the first place, and kept it for several years, until this final note was taken." The only reasonable inference from all the evidence is that, when the new note was taken, Steere withdrew the amount of the note, and that thereafter the bank held it, and defendant continued to hold the stock. The stock was the consideration of the note, and when it was received by the bank the bank evidently parted with value. Under these circumstances, was Steere, as an officer of the bank, authorized to make an agreement with defendant that he should not be called upon to pay the note? It was properly held by the territorial supreme court "that officers of banks have not the power to excuse or limit the legal obligations of persons to the banks they represent, by agreeing with them that they shall not be held liable or called upon to pay the obligations which they make, either as principal debtors or accommodation makers or indorsers, and on the credit of which the bank has parted with its funds." *Thompson v. McKee*, 5 Dak. 172, 37 N. W. 367. This principle is applicable to the case at bar. The evidence discloses that the First National Bank parted with value when it obtained the note sued upon, and the complaint shows that the First Bank purchased it for a valuable consideration. We think Mr. Steere was not authorized to make the agreement mentioned in his testimony, and that the court below was right in directing a verdict for plaintiff. The result thus reached commends itself as being consistent with prudence and fair dealing. Men should not put promissory notes in circulation which they do not intend to pay. If the contract regarding defendant's bank stock was as he now claims it to have been, such contract should have been evidenced by a writing which truly expressed its terms, and not by an instrument of entirely different import. Defendant's want of ordinary prudence is alone responsible for any loss he may sustain by reason of his connection with these banking institutions.

Banks—Subscription Note—
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It is conceded that the judgment exceeds by \$60 the amount due when it was rendered. It should be reduced from \$1,141 to \$1,081. As attention was not called to this error in computation until appellant's brief was filed in this court, the modification will not affect respondent's costs or disbursements. The action is remanded, with directions to modify the judgment as indicated herein.

Costs.

NOTE.

President—Release and Satisfaction of Claims.—The president of a corporation has, of himself, no authority to release subscriptions to the stock of the corporation. *Custar v. Titusville Gas, etc., Co.*, 63 Pa. St. 381. The president of a bank has no implied authority to surrender or release the claim of the corporation against any one; *Olney v. Chadsey*, 7 R. I. 224; *Hodge v. First Nat. Bank*, 22 Gratt. (Va.), 51; nor has the president of an insurance company any such authority; *Brouwer v. Appleby*, 1 Sandf. (N. Y.), 158; nor has the president any power to stay the collection of an execution in favor of the corporation. *Spyker v. Spentz*, 8 Ala. 333.

VALDETERO

v.

CITIZENS' BANK OF JENNINGS *et al.*

(Supreme Court of Louisiana, May 15, 1899.)

Cashier—Power to Bind Bank by Contract.*—While the cashier, it is true, does not represent his bank away from its domicile, by continuing the act undertaken while away after his return without objection on the part of the directors, if the latter sanction completing the act, it becomes the act of the bank.

Checks—Stopping Payment of.—A check issued by the bank should not be countermanded as to its payment without cause.

Same—Consideration—Case at Bar.—A loan promised by a cashier, personally and as cashier, to enable one to go in search of the bank's president, who is sick in body and mind, and has disappeared, has consideration enough to hold the bank for the promise of its cashier, for which loan the latter issued a check, and, without cause shown, stopped payment without proof enough of any cause for stopping it, after the one who went in search had left, and was performing his part of the agreement.

(Syllabus by the Court.)

*See note at end of case.

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APPEAL by both parties from Calcasieu parish judicial district court. *Affirmed.*

Schwing & Moore and *Fournet & Fournet* for plaintiff.

Cline & Cline and *Pujo & Moss*, for defendants.

BREAUX, J. Plaintiff sued for damages in the sum of \$10,000, claimed as having grown out of the defendants' refusal to honor a check drawn by the former on the Citizens' Bank of Jennings. It appears Case Stated. that plaintiff left his home in Jennings, and repaired to New Orleans, in search of Dr. E. M. Burke. Plaintiff learned while he was in New Orleans that the missing Dr. Burke was in Tampa, Fla. The doctor was a very sick man, both in body and mind. Plaintiff was his friend and the friend of the family. He had been in his employ for many years, and their business relations were close. The defendant Hoffman also concerned about the absence of Dr. Burke, came to New Orleans, and met plaintiff. He (Hoffman) was cashier of the Citizens' Bank of Jennings, and the missing Dr. Burke was its president. Hoffman particularly was put out by the disappearance of the president, whom he charged with having taken funds to which he had no right. After some talk over the situation, the defendant Hoffman, in the presence of Dr. Burke's wife, who was in New Orleans, and who testified in the case as a witness, induced plaintiff to go to Florida, and bring back Dr. Burke. He (Hoffman) promised Valdetero, as an inducement, that he would honor the latter's check on the Citizens' Bank for the sum of \$300 in favor of L. N. Brunswick & Co., merchants in New Orleans; whereupon plaintiff drew his check in favor of Brunswick & Co., and left for Florida. During his absence the check was not honored, and the defendant cashier, Hoffman, failed to carry out his promise. He returned plaintiff's check to Brunswick & Co., and directed them to draw a draft on plaintiff for \$300, and forward it to him (Hoffman) at Jennings; that he would then remit for it by New Orleans exchange. The

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draft was drawn by Brunswick & Co., and forwarded to the bank. Upon its receipt the bank issued a check, signed by the cashier, on the State National Bank of New Orleans, which was mailed to Brunswick & Co.; but, before it could be presented and paid, payment was stopped by Hoffman. In explanation of his action in thus refusing to pay the check, Hoffman wrote to Brunswick & Co., charging plaintiff with having made false representations, and having drawn without authority on the bank at Jennings, in which he had no funds. Defendants, in answer to plaintiff's petition, pleaded the general denial, and Hoffman, in the same answer, pleaded that he did not seek to injure the plaintiff; that, at the time that plaintiff alleged that authority was given to him to draw on the Citizens' Bank, he (plaintiff) and Mrs. Burke, the president's wife, as well as respondent Hoffman, were in the city of New Orleans, searching for Dr. Burke, who was largely indebted to the bank, of which he was president, having, without the knowledge of the bank's cashier (or, rather, officers), drawn from the vaults of the bank and failed to charge himself with the sum of \$1,500; that he (the cashier) had reason to believe that he still had the amount in his possession; that he was in the city of New Orleans; and that he had determined to have him arrested. Here, at that meeting, he was informed by the plaintiff that Dr. Burke was not in New Orleans, but in Florida, and plaintiff said he was willing to go to Tampa, Fla., and bring him back, but he had no funds; whereupon defendant Hoffman avers that he promised to pay the traveling expenses of plaintiff in going in quest of Dr. Burke, which expenses he did not believe at the time would exceed \$100. He also avers that plaintiff was not authorized by him to draw on the Citizens' Bank for any sum, other than the sum needful to bring back Dr. Burke; that, after the check was presented to the bank at Jennings for payment, he (Hoffman) returned it, and sent a form of draft to Brunswick & Co. to be signed, it being drawn in favor of the Citizens' Bank of Jen-

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nings, on plaintiff; that this form was filled in due course of business; that he honored it by issuing a check of his bank on the State National Bank; but, before it was presented to the drawee for payment at New Orleans, he learned that \$200 of the amount was to be used to pay an indebtedness of Dr. Burke to L. N. Brunswick & Co., and for that reason he at once dispatched to the bank and to Brunswick & Co., stopping the payment of the draft. The ownership of a drug store also figures in this case, and gives rise to incidental issues of the case. The question, as relates to the drug store, was whether defendant Hoffman knew, or did not know, that the store was owned by the plaintiff. Dr. Burke fell sick in Florida, and died a few days after. The chief issue of fact is whether defendant Hoffman promised, in the name of the bank, to pay the check, as alleged by plaintiff, and whether he is also personally bound. Plaintiff swore that he informed defendant Hoffman that he could not leave for Florida unless his indebtedness to Brunswick & Co., of \$200, was taken care of by some one, as it would mature during his absence. He, in addition, said to him that he would need \$100 for his expenses; making the \$300, for which he requested a check, which he says defendant promised to honor. He swore positively that he informed defendant Hoffman of his indebtedness to Brunswick & Co., and it was only after he had been thoroughly informed that Hoffman promised to cash the check. The testimony of plaintiff on this point is corroborated by the wife of Dr. Burke, who was present, and said she heard the conversation. This was denied by defendant. The case was tried before a jury, and a verdict of \$175 was found in favor of the plaintiff. From the verdict and the judgment of the court, the defendant prosecutes this appeal.

We, in the first place, take up for decision the question relating to Hoffman's personal liability *vel non*. The record discloses that he had a direct interest in the return of Dr. Burke, or, at any rate, he felt that certain interests in which he was concerned would be

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subservd by his return. He was particularly anxious regarding his return to Jennings, and quite willing to expend an amount to find out where he was, and make his coming back certain. When informed by plaintiff as to his whereabouts, he was quite willing to advance to plaintiff the expenses of the trip to Tampa, to enable him to go in search of Dr. Burke. The defendant does not deny that he promised to make the advances for the trip to Florida, but says that he had no idea that the amount needed would be more than \$100. The verbal testimony, other than his own, and the letters, render it certain, we think, that he was to see to the cashing of a draft or check for the sum of \$300, as alleged by plaintiff. It is evident, we think, that the defendant changed his mind after his return from New Orleans to Jennings, and for some reason concluded that the return of Dr. Burke was not consideration enough to justify him in paying the promised loan of \$300. He adhered to his promise to make the advance sufficiently after his return to write to Brunswick & Co., and to change the name on their check, as before stated, and after their answer to send a check, the payment of which he subsequently stopped. The first change made as to the form of the check, and the order not to pay the last check, as well as defendant's letters regarding plaintiff, and his want of authority to draw a check as he had, were enough to annoy and cause worry to any business man regarding his credit; and we are decidedly of the opinion that plaintiff had cause to complain. The agreement between plaintiff and this defendant was complete, and the former was on his way to Florida to perform his part of the agreement. It was entirely too late to recall the promise. So far as the record discloses, the plaintiff complied with his obligation. At the risk of loss, one who has promised to cash a check, under the circumstances here, cannot escape the responsibility by shifting his position, and contending, in the face of positive evidence to the contrary, that the amount was to be used for another pur-

Checks—Stopping
Payment of.

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pose than that for which most of it had been used. A deliberate charge against one that he has drawn a negotiable instrument without authority, when it is evident that he was fully authorized, gives ground for complaint, and, in a case such as the one before us for decision, for damages. We have noted the fact that the suit was brought against the defendant Hoffman and against the Citizens' Bank *in solido*. The theory upon which the latter was made a party was that it had acted through Hoffman, its cashier, and that his utterances and acts bound the bank. Ordinarily they would not. This cashier was at some distance from the bank's place of business, and the presumption is that away, as he was, from the bank, he was not acting under the supervision, direction, and control of the board of directors. The agreement entered into between Hoffman and plaintiff, in the city of New Orleans, of itself would not be binding on the bank, in our judgment. Cashiers, unless authorized, do not take with them from place to place the agency they have at the bank; but this cashier returned to his home in Jennings, and there resumed the functions of cashier, with all its responsibilities. He continued in some respects, at least, to do that which he had bound himself, without authority perhaps, while away from the bank, to do. In order to meet the payment of the \$300, and to complete the advances as promised, he, as cashier, sent the bank's check, payment of which he afterwards countermanded. This act was the act of the bank, and no one else. The cashier is the directing agent of the bank in its actual management. He speaks for the bank, and is usually its executive officer in all things not specially intrusted to the directors. "He is the general manager, and, unless his operations are restricted by the directors, he is for many purposes looked upon by law, and he is treated, as if he were the whole body, whom he has power to bind, even by his tortious acts." Grant, Banks, 518. It was at the bank's counter that the cashier issued the check. It

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Bind Bank by
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is reasonable to presume that his act met with the approval of the board of directors, and that proper registry and entries went into their books with their sanction. All this was done by the cashier without one word of objection from the directors. Plaintiff and others concerned had the right to suppose that they were dealing with the bank that had made the act of its cashier, while absent, its own after his return. It must be borne in mind that Dr. Same—Consideration—Case at Bar. Burke was the president of the bank, and that the money advanced was to enable plaintiff to go in search of the president, who was a debtor to the bank, and in whose return the bank also, it may be, had some interest, and for whom the board of directors must have had some concern. The loan to plaintiff, or rather the promised loan, by cashing his check as before stated, was not out of the usual course of business. He was the owner of a drug store in Jennings, and had done some business with the bank. True, his name, for reasons the evidence seeks to explain, did not figure in public as the owner; but it was well known to a few that he was the real owner, and not Dr. Burke, whose name appeared as the owner. Knowledge of this fact was traced to some of the officers of the bank, who, plaintiff contends, had full knowledge of his ownership. True, this drug store had but little value, yet enough to give a limited standing to plaintiff as a merchant. It was not extraordinary, under the circumstances, if, as we think, the bank gave its approval to the cashier's acts, as alleged. No attempt, as we take it, was made to recall this approval (defendants joined in one answer), save, at the last moments before trial, the defendants filed a peremptory exception of no right of action, on the ground, "if the draft was drawn, as averred by plaintiff, then, in that event, exceptor avers that the said Hoffman was acting beyond the scope of his authority, and was not authorized to bind the bank." For the purpose of its trial, the averments of fact of plaintiff must be taken as true. We think that they do show

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that defendant was acting within the scope of his authority after his return to his place of duty, and that the evidence does not, as relates to the exception, negative the allegations of plaintiff's petition, but, on the contrary, that his acts, as cashier, conformed with the views of the board. The jury fixed the damages at \$175. They were of the vicinage, probably knew the parties, and are particularly competent to determine the amount of damages in such case. The judgment is affirmed.

On Application for Rehearing.

(June 29, 1899.)

WATKINS, J. Plaintiff prays for judgment against the Citizens' Bank of Jennings and John H. Hoffman *in solido* for the sum of \$10,000. The case was tried by a jury, who rendered a verdict in favor of the plaintiff, and against the defendants, for \$175. From this judgment, both defendants prosecute an appeal. In this court the appellee filed an answer, and prayed for an increase in the allowance to the sum of \$2,000. An examination of the case led this court to believe that the verdict and judgment were right, and it accordingly affirmed the same. Defendants' application for rehearing consists in a typewritten brief, in which counsel purport to review the evidence; and a careful examination of same discloses nothing new or additional to the argument originally made. The application chiefly rests upon the two following questions: First. Can a person who is cashier of a bank transact business in his own name and for himself, without making the bank responsible? Second. Can he do this as an individual through himself as cashier, or through the assistant cashier, without making the bank responsible for his personal acts? These two questions may be answered in the negative, for the reasons assigned in the cases of *Richardson v. Watson* (recently decided) 26 South. 422, and *Seixas v. Bank*, 38 La. Ann. 424, which is therein referred to. In our opinion, it would be a dangerous doctrine to announce

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that any transaction carried on by a cashier necessarily resulted in making the bank responsible, whether the officers and directors of the bank were aware of it or not; and it would be still more dangerous to extend the bank's responsibility to any act of an assistant cashier. Banks are established for public convenience, and in the interest of the business community, and do business in pursuance of well-known and well-established rules; and no officer or employee of a bank has any right to deal with its funds, or negotiate transactions in their name, unless in pursuance of those rules, and with full knowledge of all other officers of the bank who are entitled to information. The cause of action grows out of defendants' refusal to honor a check drawn by the plaintiff on the defendant bank; defendant Hoffman being the cashier of the defendant bank. It appears that one Dr. Burke was president of the bank, and had left home, and gone to Florida, on account of his being "a very sick man, both in body and mind." The plaintiff was his friend and a friend of his family, and had been in his employ for many years, and their business relations were intimate. He was very anxious as to the whereabouts and condition of Dr. Burke. This anxiety resulted in search being made for Dr. Burke. It appears from the evidence that Hoffman induced the plaintiff to go to Florida, and bring back Dr. Burke, and promised him, as an inducement, that he would honor the latter's check on the defendant bank for the sum of \$300 in favor of L. N. Brunswig & Co. Thereupon plaintiff drew the check, and left for Florida; but, during his absence, the check was dishonored, and the cashier, Hoffman, failed to carry out his promise, and returned the check to Brunswig & Co., unpaid, directing them to draw a draft on plaintiff for \$300, and forward it to him, and that he would remit the exchange. The draft was drawn, forwarded to the bank, and a check issued by the cashier on the State National Bank of New Orleans, and same was mailed to Brunswig & Co. Immediately

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afterwards same was countermanded, and payment stopped by Hoffman. The latter assigned to Brunswick & Co. his reason for so doing to be that plaintiff had made false representations to him, and had drawn on the defendant bank without authority; he having no funds at his credit. The defense of Hoffman is that, after consenting to give plaintiff a check to aid in bearing his expense to Florida, "he learned that two hundred dollars of the amount was to be used to pay an indebtedness of Dr. Burke to L. N. Brunswick & Co."; Dr. Burke being alleged to have overdrawn his account with the bank to the extent of \$1,500. The determinative question in the case was whether "Hoffman promised, in the name of the bank, to pay the check, as alleged by plaintiff." We are satisfied, from an examination of the record, as well as from the statement of the case, that both of the defendants had an interest in the return of Dr. Burke, the president of the bank. It seems that Dr. Burke fell sick in Florida, and died a few days afterwards. Our opinion holds, and our examination of the record confirms the statement, that "the agreement between plaintiff and this defendant was complete, and the former was on his way to Florida to perform his part of the agreement. It was certainly too late to recall the promise"; the plaintiff having complied fully with his obligation. Under these circumstances, we think both defendants are liable, and our opinion so holds. In issuing the check of the bank, and countermanding the payment of same, Hoffman acted for the bank, and in the interest of the bank, as well as his own. This entire matter appertains to a transaction of the bank. The interest of the bank was to be subserved by the restitution of Dr. Burke, who had largely overdrawn his personal account therewith; and the cashier was evidently seeking to further the interest of the bank by making the arrangement he proposed to the plaintiff, and by issuing the check in conformity therewith. On this state of facts, plaintiff acted in undertaking the search for their restitution of Dr. Burke, and evidently at

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some expense; and this provision was evidently intended to place him in funds to discharge the same. Our opinion says: "The loan to plaintiff, or rather the promised loan by cashing his check as before stated, was not out of the usual course of business." It further says: "It was not extraordinary, under the circumstances, if, as we think, the bank gave its approval to the cashier's act as alleged. No attempt, as we take it, was made to recall this approval." We have examined the opinion and evidence, and find no reason to change our view. The case being one in damages, and tried by a jury of the vicinage, and an application for rehearing made and overruled, and said judgment having been affirmed by this court by the unanimous voice of its judges, it would require a much more extreme case than that which is stated on the application for rehearing to induce this court to render a different decree; the amount allowed being comparatively insignificant in comparison with the amount claimed and the prominence of the parties to this litigation. For this reason the rehearing is refused.

NOTE.

Powers of Cashiers of Incorporated Banks.—*Generally.*—The cashier, as chief executive officer of a bank, has the management of its affairs in all things not peculiarly committed to the directors. He is the agent of the corporation and not of the directors. *Bank of Kentucky v. Schuylkill Bank*, 1 Pars. Sel. Cas. 180; *Bissell v. First Nat. Bank*, 69 Pa. St. 415; *Merchants' Bank v. State Bank*, 10 Wall. 650; *Baldwin v. Bank of Newbury*, 1 Wall. 234. See, also, *Martin v. Webb*, 110 U. S. 7, 3 Am. & Eng. Corp. Cas. 331; *Bridendecker v. Lowell*, 32 Barb. 9; *Badger v. Bank of Cumberland*, 26 Me. 428; *Asher v. Sutton*, 31 Kan. 286, 3 Am. & Eng. Corp. Cas. 342. He has inherent power, as such executive officer, to do all things which come within the general scope of the legitimate business of banking. *Lloyd v. West Branch Bank*, 18 Pa. St. 172; *West St. Louis Sav. Bank v. Shawnee County Bank*, 95 U. S. 557; *Matthews v. Massachusetts Nat. Bank*, 1 Holmes (C. C.), 396; *United States v. City Bank*, 21 How. 356; *Union v. Mechanics' Bank*, 1 Pet. (U. S.) 46; *Neiffer v. Bank of Knoxville*, 1 Head (Tenn.), 162; *Wakefield Bank v. Wardsell*, 55 Barb. 602; *Fleckner v. Bank of United States*, 8 Wheat. (U. S.) 388. And, being held out to the world as the general agent of the bank, his acts will bind the bank in favor of

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third persons who have no knowledge of any limitation placed upon his powers by the board of directors. *Merchants' Bank v. State Bank*, 10 Wall. 604; *Morse v. Massachusetts Nat. Bank*, 1 Holmes (C. C.), 209; *Union v. Mechanics' Bank*, 1 Pet. (U. S.) 46; *Casey v. Bank*, 100 U. S. 446; *Burnham v. Webster*, 19 Me. 232; *Reynolds v. Collins*, 78 Ala. 94; *Bank of Kentucky v. Schuylkill Bank*, 1 Pars. Sel. Cas. 180; *Matthews v. Massachusetts Nat. Bank*, 1 Holmes (C. C.), 396; *Lloyd v. West Branch Bank*, 15 Pa. St. 172.

Although special authority from the directors is essential where the cashier acts without the ordinary course of his duties, such authority may be implied where the directors suffer the cashier to pursue a particular line of conduct for a considerable period of time, or acquiesce in the performance of similar acts, or avail themselves of the benefit of the transactions. *Caldwell v. Nat. Mohawk Valley Bank*, 64 Barb. 333; *Martin v. Webb*, 110 U. S. 7, 3 Am. & Eng. Corp. Cas. 331; *Ballston Spa Bank v. Marine Bank*, 16 Wis. 125; *Badger v. Bank of Cumberland*, 26 Me. 428; *Medomak Bank v. Corlis*, 24 Me. 36; *Robinson v. Bealle*, 20 Ga. 275; *Payne v. Commercial Bank*, 14 Miss. 24; *Merchants' Bank v. State Bank*, 10 Wall. 604; *Bank of Penn. v. Reed*, 1 Watts & S. (Pa.) 101; *First Nat. Bank v. Graham*, 79 Pa. St. 106; *Ecker v. New Windsor Bank*, 59 Md. 291; *City Bank of New Haven v. Perkins*, 29 N. Y. 554; *Stamford Bank v. Benedict*, 15 Conn. 437. And there are cases which hold that acts of the cashier performed in accordance with authority conferred by the board of directors will bind the bank, though the acts be *ultra vires* of the corporation [*Zugner v. Best*, 12 Jones & S. (N. Y.) 393; *Bank of Kentucky v. Schuylkill Bank*, 1 Pass. Tel. Cas. 180; *Hagerstown Bank v. London & C. Society*, 3 Grant Cas. (Pa.) 135], or beyond the ordinary scope of the cashier's duties [*Bank v. Graham*, 79 Pa. St. 106, 100 U. S. 699; *Chemical Nat. Bank v. Kohner*, 85 N. Y. 189; *Bank of Vergennes v. Warren*, 7 Hill (N. Y.), 91; *Bank of Pennsylvania v. Reed*, 1 Watts & S. (Pa.) 101; *Donnell v. Lewis County Sav. Bank*, 80 Mo. 165]. But this principle is opposed to the ruling in *Merchants' Bank v. State Bank*, 10 Wall. 604.

Generally speaking, the bank will not be responsible for acts of the cashier which are solely within the prerogatives of the directors, though he act in good faith and under color of authority. *Morse v. Massachusetts Nat. Bank*, 1 Holmes (C. C.), 209; *Watson v. Bennett*, 12 Barb. 196; *United States v. City Bank*, 21 How. 360; *Shryock v. Basehove*, 82 Pa. St. 159; *Daviess County Sav. Ass. v. Sailor*, 63 Mo. 24; *Bank of East Tenn. v. Hooke*, 1 Coldw. (Tenn.) 156; *Rhodes v. Webb*, 24 Min. 292; *Bank of Com's v. Bank of Buffalo*, 6 Paige (N. Y.), 497; *Percy v. Millandon*, 3 La. 568. But where the cashier is notoriously left to do all the outside business of the bank, another bank which advances money on negotiable securities pledged by such cashier in the name of his bank may presume the consent of the directors to the act of the cashier. *Mercantile Bank v. McCarthy*, 7 Mo. App. 318.

A cashier has neither inherent nor implied power to convey or encumber the corporate property, other than the negotiable securities mentioned below, such power being a prerogative of the board of directors. *United States v. City Bank of Columbus*, 21 How. 356; *Legget v. New Jersey Mfg. & Banking Co.*, 1 N. J. Eq. 541; *Tennessee v. Davis*, 50 How. Pr. (N. Y.) 447; *Holt v. Bacon*, 25 Miss.

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567. But he may, in the ordinary course of business, discharge a mortgage and note of the bank. *Ryan v. Dunlap*, 17 Ill. 40.

In the absence of consent or ratification, a bank will not be liable for the act of its cashier in purchasing boots and shoes in the name of the bank for the benefit of a third person. *North Star Boot & Shoe Co. v. Stebbins* (S. D.), 48 N. W. Rep. 833.

A cashier may indorse to himself and sue on a note payable to the bank. *Young v. Hudson*, 90 Mo. 102.

The cashier of a national bank, holding the paper of a firm of which the cashier is a member, has no power to bind the bank by an agreement that there shall be no liability upon an accommodation note procured by him to be substituted, for a special purpose, for the indebtedness of the firm. *Allen v. Bank*, 127 Pa. St. 51.

A cashier cannot bind his bank by an assurance to the indorsee of a note payable to the bank that he will not be held liable. *Thompson v. McKee*, 5 Dak. 172.

In *Walden Nat. Bank v. Birch*, 130 N. Y. 221, it appeared that the cashier of a national bank, to obtain security for a note discounted by the bank, procured from the maker an assignment to himself of some stock in the bank, and, in order to evade the national banking law, placed stock in a separate envelope, and indorsed the note to himself. It was held that he held the stock for the bank or cashier, and that his sureties were liable for his misappropriation of the stock.

The acts of a cashier, performed in behalf of the bank which are not criminal or against public policy, when executed in whole or in part, are binding on the bank, and make it liable where it enjoys the benefit of the acts. *Owens v. Stapp*, 32 Ill. App. 653.

The relations of a bank with its cashier are analogous to those of a principal with his agent, and the principles governing the right of disaffirming unauthorized acts of an agent are applicable. *Second Nat. Bank v. Burt*, 93 N. Y. 233, 3 Am. & Eng. Corp. Cas. 233.

If a cashier receives securities on a loan from his bank to a trustee, with knowledge that the securities belong to a trust, the bank is affected with the knowledge of its cashier, and is put upon inquiry as to whether the trustee has authority to pledge the securities. *Loring v. Brodie*, 134 Mass. 453, 3 Am. & Eng. Corp. Cas. 277.

Collection of Debts—Compromising Claims.—The cashier of a bank has power to collect debts due the bank, and may exercise his discretion in taking measures for the security and collection of the debt. *Bridendecker v. Lowell*, 32 Barb. 9; *Eastman v. Coos Bank*, 1 N. H. 23; *Carver v. Paul*, 41 N. H. 24; *Young v. Hudson*, 99 Mo. 102; *United States v. City Bank*, 21 How. 356. But he has no inherent authority to receive anything but money. *Morse on Banks and Banking* (3d. Ed.), § 159. And he has no inherent power to compromise a claim, though such power may sometimes be presumed. *Morse on Banks and Banking* (3d. Ed.) § 159; *Chemical Nat. Bank v. Kohnner*, 85 N. Y. 189. He cannot change the nature of the debt, nor make the bank an agent of its debtor. *Sandy River Bank v. Merchants', etc., Bank*, 1 Biss. (C. C.) 146; *Bank of Pennsylvania v. Reed*, 1 Watts & S. (Pa.), 101; *Payne v. Commercial Bank*, 14 Miss. 24; *Ecker v. New Windsor Bank*, 59 Md. 291. Nor can he, by virtue of his office, take private notes and drafts in settlement of an account and give a receipt in full. *Sandy River Bank v. Merchants', etc., Bank*, 1 Biss. (C. C.), 146. Nor release the maker of a note,

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payable to and held by the bank. *Dedham Institution v. Slack*, 6 Cush. (Mass.) 408; *Hodge v. Nat. Bank*, 22 Gratt. (Va.) 51. And, in general, he has no authority to make any arrangement whereby the security of the bank on paper due it will be released or impaired. *Daviess County Sav. Ass'n v. Sailor*, 63 Mo. 24; *Gallery v. Albion Nat. Bank*, 41 Mich. 169; *Merchants' Bank v. Rudolf*, 5 Neb. 527. But see *Bank v. Klingensmith*, 7 Watts (Pa.), 523.

Transfer of Securities—Indorsement.—Unless authority be conferred by the bank, a cashier has no power to indorse non-negotiable paper. *Holt v. Bacon*, 25 Miss. 567; *Barrick v. Austin*, 21 Barb. 241; *Zillet v. Philips*, 13 N. Y. 114. But he has power to transfer and indorse the negotiable paper belonging to the bank for the purpose of collection [*Potter v. Merchants' Bank*, 28 N. Y. 641; *Elliott v. Abbott*, 12 N. H. 549; *Carver v. Paul*, 4 N. H. 24], and to discharge the obligations of the bank [*Carey v. Giles*, 10 Ga. 9; *Lafayette Bank v. State Bank of Illinois*, 4 McLean, 208; *Crocket v. Young*, 1 S. & N. (Miss.) 241; *Everett v. United States*, 6 Port. (Ala.) 166; *Sturgis v. Bank of Circleville*, 11 Ohio St. 153; *Kimball v. Cleveland*, 4 Mich. 606]. And the signature of the cashier to a transfer of certificates of stock of another corporation held by the bank as collateral will be considered as the signature of the bank, though such instruments are not negotiable paper. *Matthews v. Massachusetts Nat. Bank*, 1 Holmes (C. C.), 396; and see *Cecil Nat. Bank v. Watson*, 105 U. S. 217. But an indorsement which will bind the bank must be within the scope of his duties as cashier. *Blair v. First Nat. Bank*, 2 Flip. (C. C.) 111; *Schneitman v. Noble*, 75 Iowa, 120.

In general, it may be said that no attempted transfer by the cashier of the bank's securities will be valid when it appears that the transfer was made in prejudice of the rights and interests of the bank. *Smith v. Lawson*, 18 W. Va. 212, 3 Am. & Eng. Corp. Cas. 294; *Barnes v. Bank*, 19 N. Y. 152. But in *Bank of New Haven v. Perkins*, 29 N. Y. 554, it is held that the authority of the cashier to make such a transfer *ex officio*, for a legitimate purpose, is undoubted, the court citing *Ang. & Ames on Corp.* 296; 2 *Parsons on Notes and Bills*, 7; *Fleckner v. Bank of United States*, 8 Wheat. (U. S.) 338. And where no irregularity appears, a cashier, according to the great preponderance of the authorities, may transfer and indorse negotiable securities when given special authority from the bank. *Wild v. Passamaquoddy Bank*, 3 Mason (C. C.), 505; *State Bank of Ohio v. Fox*, 3 Blatchford (C. C.) 431; *Genesee Bank v. Patchin Bank*, 19 N. Y. 312; *Cooper v. Curtis*, 30 Me. 488; *Robb v. Ross County Bank*, 41 Barb. 586; *State Bank v. Wheeler*, 21 Ind. 90; *Harper v. Calhoun*, 8 Miss. 203; *Blair v. Mansfield Bank*, 2 Flip. (C. C.) 111; *Bissell v. First National Bank*, 69 Pa. St. 415; *Badger v. Bank of Cumberland*, 20 Me. 428; *Smith v. Lawson*, 18 W. Va. 213, 3 Am. & Eng. Corp. Cas. 294; *Bank of United States v. Davis*, 4 Cranch (U. S.), 533; *Maxwell v. Planet Bank*, 10 Humph. (Tenn.) 507; *Farrar v. Gilman*, 19 Me. 440; *St. Louis Perpetual Ins. Co. v. Cohn*, 9 Mo. 421; *Bank of New York v. Bank of Ohio*, 29 N. Y. 619. But he has no power, without special authority, to bind the bank by an official indorsement of his individual note. *West St. Louis Sav. Bank v. Shawnee County Bank*, 95 U. S. 557; *Blair v. Mansfield Bank*, 2 Flip. (C. C.) 111. Where only the cashier's actual name appears, patrol evidence may be admitted to show the real character

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of the indorsement. *Mechanics' Bank v. Columbia Bank*, 5 Wheat. (U. S.) 334; *Utica v. Magher*, 18 Johns. (N. Y.) 342. But such an indorsement, although made upon a note not belonging to the bank, and merely for the accommodation of the payee or prior indorser, has been held binding upon the bank as against a purchaser in good faith, for value, before maturity. *Houghton v. First National Bank of Eckhorn*, 26 Wis. 663; *Bank of New York v. Bank of Ohio*, 29 N. Y. 619; *Banking Ass'n v. White Lead Co.*, 35 N. Y. 505; and see *North River Bank v. Aymer*, 3 Hill (N. Y.), 262; *Farmers' & Mechanics' Bank v. Butchers' & Drovers' Bank*, 14 N. Y. 643, 16 N. Y. 125; *Genessee Bank v. Patchin Bank*, 19 N. Y. 312.

A cashier cannot by virtue of his office release a surety upon a note held by the bank, even though the bank holds other security to which it might resort, special authority being necessary to justify such release. *Merchants' Bank v. Rudolph*, 5 Neb. 527; *Cochecho Bank v. Haskell*, 51 N. H. 116; *Daviess County Sav. Ass'n v. Sailor*, 63 Mo. 24; *Ecker v. First National Bank*, 59 Md. 291; *Ryan v. Dunlap*, 17 Ill. 40.

O'BRIEN *et al.*

v.

EAST RIVER BRIDGE CO.

(*Supreme Court of New York, Appellate Division, First Department, Dec. 30, 1898.*)

Insolvent Bank — Preferences — Officer Using Knowledge. — A director of the M. S. Bank, who was also the president of a bridge company, when he had acquired as such director the knowledge that such bank was in imminent danger of insolvency, and would be closed the following day, and that the St. N. Bank, as the agent of the M. S. Bank at the latter's clearing house, had in its possession a large amount of the latter's securities, and was responsible for all checks of the M. S. Bank that would be presented at the clearing house on the next morning, signed as president of the bridge company a check upon the M. S. Bank for the amount owing by the latter to the bridge company, and had it passed through the clearing house on the next day, thereby effecting a transfer of such amount from the M. S. Bank to the bridge company. *Held*, that such transfer was an invalid preference under section 48 of the stock corporation law of New York.

APPEAL by complainants from judgment on report of referee. *Reversed.*

Argued before VAN BRUNT, P. J., and McLAUGHLIN, PATTERSON, O'BRIEN, and INGRAHAM, JJ.

*See notes at end of case.

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Samuel Untermyer, for appellants.

Eugene Treadwell, for respondent.

PATTERSON, J. This action was brought by the receivers of the Madison Square Bank to recover from the defendant a sum of money to which they claimed they were entitled under the provisions of section 48 of the stock corporation law, which reads as follows :

"No corporation which shall have refused to pay any of its notes or other obligations when due in lawful money of the United States, nor any of its officers or directors, shall transfer any of its property to any of its officers, directors or stockholders, directly or indirectly, for the payment of any debt, or upon any other consideration than the full value of the property paid in cash. No conveyance, assignment or transfer of any property of any such corporation, by it or by any officer, director or stockholder thereof, nor any payment made, judgment suffered, lien created or security given by it or by any officer, director or stockholder, when the corporation is insolvent or its insolvency is imminent, with the intent of giving a preference to any particular creditor over other creditors of the corporation, shall be valid. Every person receiving by means of any such prohibited act or deed any property of the corporation shall be bound to account therefor to its creditors or stockholders or other trustees. No stockholder of any such corporation shall make any transfer of his stock therein to any person in contemplation of its insolvency. Every transfer or assignment or other act done in violation of the foregoing provisions of this section shall be void."

The material facts of the case are without dispute. On the 8th of August, 1893, the defendant was a depositor in the Madison Square Bank, and it had standing to its credit on the books of the bank on that day the sum of \$50,000. As to that amount, the ordinary relation of debtor and creditor, and no other, existed between the bank and the depositor. On the night of the 8th of August, 1893, it became known to Frederick Uhlman, a director of the Madison Square

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Bank and also the president of the East River Bridge Company, that the bank was insolvent, or in imminent danger of insolvency, and that it would be closed the following day. Frederick Uhlman also knew that the St. Nicholas Bank was the agent at the clearing house of the Madison Square Bank, and that on the 8th of August, 1893, the St. Nicholas Bank had in its possession a large amount of securities belonging to the Madison Square Bank, and that it held such securities as collateral for any and all obligations as agent of the Madison Square Bank. He also knew that the St. Nicholas Bank had notified the clearing house that it would cease to act for the Madison Square Bank, and that the St. Nicholas Bank, by the rules and regulations of the clearing house, was responsible for all checks of the Madison Square Bank that would be presented at the clearing house in the exchanges on the morning of the 9th of August. All this knowledge was acquired by Frederick Uhlman as a director of the Madison Square Bank. On the night of August 8th, Simon Uhlman, who was largely interested in the stock of the East River Bridge Company learned of the imminency of insolvency of the Madison Square Bank, and that it would probably be closed the following morning. Thereupon he caused a check to be filled up, drawn upon the Madison Square Bank, for \$50,000, and took it to the treasurer of the defendant at Brooklyn, where it was signed by such treasurer at about 11 o'clock at night. That being done, Simon Uhlman returned to New York City with the check, and handed it to Frederick Uhlman, who also signed it as president of the East River Bridge Company, and retained it in his possession overnight. Early on the morning of the 9th of August, Frederick Uhlman took the check to the Hanover National Bank, and instructed the authorities of that bank to have it presented at the clearing house that morning, so that it might be paid by the St. Nicholas Bank in the exchanges of that morning, and thus be credited to the East River Bridge Company, and a withdrawal effected

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of so much from the funds and moneys or securities of the Madison Square Bank under the control of the St. Nicholas Bank. The check was presented at, and passed through, the clearing house. The East River Bridge Company received a credit with the Hanover Bank, and thus the transfer of \$50,000 was completely made from the Madison Square Bank to the defendant. The Madison Square Bank was closed on the morning of the 9th of August, or, more properly speaking, was never opened for business after the 8th, and went into insolvency. Under those circumstances, the receivers claim that there was transferred by a director of the Madison Square Bank funds and moneys of that bank to a creditor, with the intent on the part of the director to give such creditor a preference, contrary to the provisions of the statute, such transfer being made when the bank was insolvent or its insolvency was imminent, and that the transfer was void, and the defendant liable to account for the money. The issues in the action were referred to a referee to hear, try, and determine. He decided that the complaint should be dismissed upon the merits. Upon such decision judgment was rendered in favor of the defendant, and from that judgment the plaintiffs appeal.

If the construction given by the learned referee to section 48 of the stock corporation law is the correct one, no other course could have been justified under the proofs than was taken by him in directing judgment for the defendant; for, as he very properly states, if the transaction, the subject of inquiry in this case, amounted to an illegal preference, it must be solely because of the part taken by Frederick Uhlman in that transaction. But we are not able to adopt the referee's interpretation of the statute. While it is one that may be said to be in derogation of the common law,—for at the common law preferences were not illegal,—yet it must be so construed that its purpose shall be attained, and not subverted or thwarted. Statutes, like contracts, are to be construed *ut res*

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magis valeat quam pereat, for that interpretation "furnishes matter for every clause [and requirement] of the statute to work and operate upon." The learned referee has considered that the interdiction of the statute applies only to the corporation, or to the officers or directors acting officially or as officers or directors. We do not think that is the proper construction, but, on the contrary, that the prohibition of the statute applies to individuals who stand in the various relationships mentioned to the corporation, and that no act of theirs or either of them shall be valid when it effects, directly or indirectly, a transfer of corporate property against the terms of the statute.

The preposition "by," as used in the forty-eighth section of the statute in this connection, is equivalent to the phrase, "through the means, act, or instrumentality of"; and that section may well be paraphrased so as to read :

"No conveyance, assignment or transfer of any property of any such corporation by it, or effected through the means, act or instrumentality of any one who is an officer, director or stockholder thereof, nor any payment made, judgment suffered, lien created or security given by it, or through the means, act or instrumentality of any one who is such officer, director or stockholder, when the corporation is insolvent or its insolvency is imminent, with the intent of giving preference to any particular creditor over other creditors of the corporation, shall be valid."

We do not think it is an essential condition that the director shall be acting officially as a director in making the transfer. An individual director cannot make an official transfer of assets of a corporation by any inherent authority derived from the mere fact of his being a director. The statute refers to a person being a director (its words mean "any one who is"); and to hold otherwise would be merely saying that the words "officer" and "director" are utterly meaningless in the connection in which they are used. What the statute condemns is a conveyance or transfer effected

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in a particular way and with a certain intent; not necessarily a corporate intent, but an intent of a person being an officer, director, or stockholder to give a preference to any particular creditor over other creditors. It contemplates the situation of officers, directors, or stockholders having, by reason of their relation to the corporation, opportunities of transferring or assigning its property and assets in some way by which a preference may be obtained by a creditor; and, whether the acts are official or unofficial, it is the purpose of the statute to make them invalid. As was said in *Throop v. Lithographic Co.*, 58 Hun, 149, 11 N. Y. Supp. 532, referring to one purpose of this section of the statute:

"It seems to have been the intention of the legislature to prevent persons occupying confidential relations towards corporations from, either directly or indirectly, profiting by the information which they have acquired because of their relation to the corporation, and which information they could use to the detriment of the general creditors of the corporation. Therefore it has been provided that, where a corporation is insolvent, an officer of such corporation shall be unable to take any of the property of the corporation to pay his particular debt."

That was said in a case in which a director of a corporation endeavored to secure a preference to himself; but the same reasoning applies so far as the disability of the officer or director is concerned. He may not use the information or knowledge he acquires by reason of his confidential relation for his own benefit. By parity of reasoning, he may not use the knowledge or information he derives from his confidential relationship for any purpose forbidden by the statute. Preferences to or by officers, directors, or stockholders fall under the same condemnation. The ultimate purpose of the section is to secure the assets of the corporation for equality of distribution among its creditors; and, to accomplish that object, any disposition of those assets, or any part of them, made with the intent and under

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the circumstances mentioned in the statute, by any of the individuals standing in the relation to the corporation of those named in the statute, is declared void.

It remains to consider whether the acts of Frederick Uhlman were of such a character as to bring them within the operation of section 48 of the stock corporation law. It is urged in this connection that the section does not apply to a banking corporation. But that question was settled in this court by what was decided in *Hirshfeld v. Bopp*, 27 App. Div. 180, 50 N. Y. Supp. 676. Frederick Uhlman's dealing with the check after it was drawn establishes the intent. His active agency in getting it paid from the funds of the bank in which he was a director, by the unusual method of taking it on the 9th of August to the Hanover National Bank and inducing them to pass it through the exchanges, connects him with the transfer of the Madison Square Bank's funds to pay a creditor preferentially, within the meaning of the statute. Whether it was his scheme or not, he executed it. He caused the transfer of those moneys to be made. It is entirely immaterial by what method the transfer was effected, if it were such as matter of fact. The act took so much of the Madison Square Bank's money, and passed it over to a simple creditor; and that was done by a person who was a director of the Madison Square Bank, knowing of the insolvency of the bank and with the intent to give a preference. That act defines itself. Here, then, was the case of a director of the Madison Square Bank using his knowledge (not only of the actual or impending insolvency of that bank, but of the fact that the St. Nicholas Bank had a large amount of the securities of the Madison Square Bank; of the fact that whatever checks drawn on the Madison Square Bank should go through the clearing house on the morning of the 9th of August would be paid; of the fact that the St. Nicholas Bank could indemnify itself for the payment of those checks; and of the fact that the \$50,000 check thus drawn and presented out of the due course of business would be paid) in such manner as to secure a

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preference to the East River Bridge Company, and intending that the assets of the Madison Square Bank should be proportionally depleted. This result would not have been accomplished but for the acts of a director of the Madison Square Bank. Frederick Uhlman obtained his knowledge as a director of the Madison Square Bank, and unless we are altogether wrong in the interpretation of the statute, and in our understanding of what its purpose is, the East River Bridge Company is not entitled to hold the money as against the plaintiffs.

The judgment must therefore be reversed, and a new trial ordered, with costs to the appellants to abide the event. All concur, except INGRAHAM, J., dissenting.

McLAUGHLIN, J. I concur in the opinion of MR. JUSTICE PATTERSON. The statute under consideration is a beneficial one, and its effect should not be destroyed by a narrow, technical, or forced construction. The object to be accomplished by it is to secure equality among all the creditors of a corporation, and to prevent fraudulent transfers in derogation or in fraud of their rights. To that end the statute provides that :

"No conveyance, assignment or transfer of any property of any such corporation, by it or by any officer, director or a stockholder thereof, nor any payment made, judgment suffered, lien created or security given by it or by any officer, director or stockholder, when the corporation is insolvent or its insolvency is imminent, with the intent of giving a preference to any particular creditor over other creditors of the corporation, shall be valid."

The act of Frederick Uhlman in procuring the payment of the check in question to the defendant was prohibited both by the letter and spirit of the statute. This was the situation : He was one of the directors of the Madison Square Bank. He was also president of the defendant, and owned or controlled one-tenth of its entire capital stock. On the evening of August 8,

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1893, he went to the bank, and there had a consultation with the officers and certain of the directors; the result of which was that he then became informed that the bank was insolvent or its insolvency imminent, and that there was little or no probability of its resuming business on the following morning. He left the bank, and immediately took advantage of the knowledge which he had thus acquired, as such director, for the benefit of the defendant, and to the prejudice of the other creditors of the bank, by procuring the payment of the check in the manner described in the prevailing opinion. This he had no right to do. As a director of the bank, he occupied a trust relation to its creditors, and it was his duty, the insolvency of the bank being at least imminent, to preserve all the assets, so far as he could, for the benefit of all the creditors. The intent of the legislature, as clearly manifest in this statute, is to prevent persons occupying a confidential relation, which Uhlman did, to the bank, from either directly or indirectly profiting by information acquired because of that relation, to the detriment of the general creditors of the corporation. *Throop v. Lithographic Co.*, 58 Hun, 149, 11 N. Y. Supp. 532; *Id.*, 125 N. Y. 530, 26 N. E. 742.

It has, however, been suggested, not by the learned referee or the counsel for the respondent, but in the dissenting opinion, that the provisions of the forty-eighth section of the stock corporation law of 1892 have made a radical change in the statute relating to transfers or assignments of property by corporations when insolvent or when insolvency is imminent. That suggestion is based upon the use of the word "such" in the second subdivision of the forty-eighth section of the statute, and it is sought to be inferred from the use of that word that the policy of the state with reference to insolvent corporations, as it had been declared by statute from the year 1825, has, in effect, been annulled. It is true that a change has been made, which authorizes a corporation to make an assignment for the benefit of creditors without preferences, but until the act of 1892

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was passed no doubt existed as to the policy of the statute or the construction of section 4 of the "Act relating to certain corporations" (1 Rev. St. p. 603), which was a re-enactment of the sixth section of chapter 325 of the Laws of 1825. The provisions of the Revised Statutes were construed in *Harris v. Thompson*, 15 Barb. 62, and it was there declared that the provision which enacted that any corporation which shall have refused to pay any of its notes or other obligations should not assign any of its property to its officers or directors for the payment of any debt related to one prohibition only, and that the provision which enacted that it should not be lawful to make any assignment in contemplation of insolvency of "such company" to any person or persons whatever, and declaring a transfer so made to any officer, stockholder, or other person to be utterly void, related to an entirely different state of circumstances. In the cases first provided for, evidence of the refusal to pay notes or current obligations was required to establish a cause of action; whereas, in the cases provided for in the second clause, no such evidence was required. See, also, *Sibell v. Remsen*, 33 N. Y. 95. In the construction given to that statute it has always been assumed by the courts that this provision was to prevent unjust discrimination among creditors of any insolvent corporation making preferential payment when it was insolvent or its insolvency imminent. *Varnum v. Hart*, 119 N. Y. 101, 23 N. E. 183. It has always been understood, so far as I am aware, since the enactment of the Revised Statutes, that this provision applied to any insolvent corporation. In *Coats v. Donnell*, 94 N. Y. 168, the court of appeals so held, saying: "The Revised Statutes prohibit preferences of insolvent corporations." I find nothing in the statute under consideration to indicate that the policy of the law has been changed by the use of the word "such," or that the condition of insolvency or the imminency of insolvency which would make a preferential transfer invalid relates only to those corporations which have failed to

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pay their current obligations on demand or when due. Such construction would take out of the operation of the forty-eighth section of the statute every corporation which did not issue negotiable paper, but continued to pay its current obligations, notwithstanding the fact that it might be hopelessly insolvent, and thus all its property might be exhausted in payment of a creditor in which the directors or some of them were personally interested. I cannot believe that the legislature ever intended simply by the use of an adjective to accomplish such result.

It is also said that the act prohibited by the statute is the act of the corporation itself, or of some one acting for or on its behalf. To give the statute this construction is to take out of its words contained therein, and thereby destroy, one of the purposes sought to be accomplished by it. But this question seems to have been settled by the court of appeals in *Throop v. Lithographic Co.*, 125 N. Y. 530, 26 N. E. 742. There the plaintiff, a trustee of a corporation, acting, not in collusion with, but in hostility to, the corporation and the other trustees, in an action to recover money loaned, procured an attachment, which was thereafter vacated, and the court of appeals, in affirming the order vacating the attachment, said :

"The plaintiff, in commencing this action and procuring his attachment, was not acting in collusion with the trustees, but distinctly in hostility to the board of directors and the other officers of the company. * * * It is true that the plaintiff, as director only, had no power over the corporate assets. He could neither assign nor transfer them to himself, or any one else, by his own act. But the plaintiff, in place of procuring an assignment or transfer by the voluntary action of the corporation, procured what is equivalent, by legal process issued on his application. Construing the language of the statute in connection with its obvious policy, we think a construction which disables an officer of an insolvent corporation from acquiring a preferential

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lien on the corporate assets by legal process is justified."

For these reasons I concur with MR. JUSTICE PATTERSON that the judgment should be reversed.

INGRAHAM, J. I cannot concur in MR. JUSTICE PATTERSON'S construction of section 48 of the stock corporation law. Laws 1892, c. 688. That section first provides that :

"No corporation which shall have refused to pay any of its notes or other obligations when due in lawful money of the United States, nor any of its officers or directors, shall transfer any of its property to any of its officers, directors or stockholders, directly or indirectly, for the payment of any debt, or upon any other consideration, than the full value of the property paid in cash."

The prohibition contained in this clause applies only to a corporation which shall have refused to pay any of its notes or other obligations when due ; and such a corporation, namely, one which shall have refused to pay any of its notes or other obligations when due, is absolutely prohibited from transferring any of its property to any of its officers, directors, or stockholders directly or indirectly, for the payment of any debt, or upon any other consideration than the full value of the property paid in cash. The section then continues :

"No conveyance, assignment or transfer of any property of any such corporation, by it or by any officer, director or a stockholder thereof, nor any payment made, judgment suffered, lien created or security given by it or by any officer, director or stockholder, when the corporation is insolvent or its insolvency is imminent, with the intent of giving a preference to any particular creditor over other creditors of the corporation, shall be valid."

Here is a prohibition of a payment to any person with the intent of giving a preference to any particular creditor. But both clauses of the section apply to the same corporation, *viz.* a corporation which shall have

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refused to pay any of its notes or other obligations when due; prohibiting it—First, from making a transfer of any of its property to any of its officers, directors, or stockholders except upon the payment of the full value of the property in cash; and, second, from making any conveyance, assignment, or transfer of any of its property, or making any payment, suffering any judgment, creating any lien, or giving any security, when such corporation, namely, a corporation which shall have refused to pay any of its notes or other obligations when due, is insolvent, or insolvency is imminent, with intent of giving a preference. The statute in force before the enactment of the stock corporation law was materially changed by the latter act. In the Revised Statutes (1 Rev. St. p. 603, § 4) it was provided that when any incorporated company shall have refused to pay any of its notes, or other evidences of debt, it should not be lawful for such company to transfer any of its property to any officer or stockholder of such company, directly or indirectly, for the payment of any debt; and it should not be lawful to make any transfer or assignment, in contemplation of the insolvency of such company, to any person or persons whatever. It was held by the supreme court in the case of *Harris v. Thompson*, 15 Barb. 64, that the words "such company," in the second clause of this section, referred to an incorporated company, and the words used were capable of that construction. This provision of the Revised Statutes was repealed by section 23 of the general corporation law (chapter 563, Laws 1890). By section 48 of chapter 564 of the Laws of 1890, which became a law at the same time as did the general corporation law, it was provided that no corporation which shall have refused to pay any of its notes, or other obligations when due, shall assign any of its property to any of its officers, directors, or stockholders for the payment of any debt; and no officer, director, or stockholder thereof shall make any transfer or assignment of its property, or of any stock therein, to any person in contemplation of its insolvency.

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There can be no doubt, I think, but that this section would only affect a corporation which shall have refused to pay any of its notes or other obligations when due. The second prohibition contained in the section was that no officer, director, or stockholder thereof, namely, a corporation which shall have refused to pay any of its notes, or other obligations when due, shall make any transfer or assignment to any person in contemplation of its insolvency. This section was amended by chapter 688 of the Laws of 1892. Section 48 of the act as then amended is the section now under consideration, and to give the second prohibition contained in this section a construction which would make it apply to all corporations would be disregarding the express language used, which confines such a prohibition to such a corporation as had been before named in the section, and would make the second prohibition refer, not to such a corporation, but to all corporations, which, it seems to me, would be contrary to the express meaning of the words used.

There is no evidence to show that, prior to August 9th, the Madison Square Bank had refused to pay any of its notes or other obligations when due. The bank was open for business, and apparently did pay, on demand, all its obligations up to 3 o'clock on August 8th, the day the check in question was drawn. It had on deposit on the night of August 8th, with the St. Nicholas Bank, its clearing-house agent, about \$28,000, and that bank further held a large amount of bills receivable and other collateral, belonging to the Madison Square Bank, as security for any amount owing by the Madison Square Bank to it; and the officers of the St. Nicholas Bank apparently had no knowledge of the Madison Square Bank's insolvency prior to the morning of August 8, 1893; nor do I think that the evidence in this case shows that there was a conveyance, assignment, or transfer of any property, or any payment made by this bank, or any officer, director, or stockholder thereof, with the intent of giving a preference to the defendant as a creditor.

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I concur with the view taken by the learned referee in his opinion as to the construction of this statute. As before stated, the section in question prohibits two acts of the bank or its officers: First, the transfer of any of its property to any of its officers, directors, or stockholders, directly or indirectly, for the payment of any debt, or for any other consideration than the full payment of the value of the property in cash. This prohibition is absolute. When a bank has failed to pay any of its notes or obligations when due, no officer, director, or stockholder thereof can receive from the bank or its officers any property of the corporation for any other consideration than the full value of the property, paid in cash. The object of the statute is to prevent the persons named from receiving any property from the bank upon any other consideration, after it has declared its inability to meet its accruing obligations. This does not depend upon the solvency or insolvency of the bank, nor upon the intent when such transfer was made. The second prohibition is that no such corporation, nor its officers, directors, or stockholders, shall make any conveyance, assignment, or transfer to any person, when the corporation is insolvent or insolvency is imminent, with the intent of giving a preference to a particular creditor. The act that is here prohibited is an act of the bank, or any one acting for or on behalf of the bank, its agents, or those in charge of its affairs, whether as officers, directors, or stockholders, creating a preference. The intent necessary to make such a transfer illegal is an intent existing on behalf of the corporation or those assuming to act for it in making the transfer. It seems to me that the act prohibited must be an act of the corporation, or an officer, director, or stockholder acting for the corporation, by whom the property is transferred, with the intent of preferring a particular creditor. It seems that this construction of the statute was directly approved by the court of appeals in the case of *French v. Andrews*, 145 N. Y. 444, 40 N. E. 214. In that case the court held that

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“merely permitting a creditor to obtain a judgment in the regular course of legal proceedings is not, on the part of the officers of the corporation, a transfer or assignment of the property of the corporation, within the meaning of the statute quoted. And the conduct of the treasurer in giving notes which might be sued by the defendant in the municipal court” did not bring the case within the contemplation of the statute. Now, in this case, a director of this bank, who is president of the defendant, a corporation who was a depositor in the bank, signed, as president of the defendant, a check upon the Madison Square Bank, and delivered that check to another bank, to be credited to the account of the defendant. It could not be claimed that either of these acts was the act of a director of the Madison Square Bank, but they were the acts of the defendant, solely in the interest of such defendant, and had no relation to the position of the president of the defendant as a director of the Madison Square Bank; and no authority that he derived as such director had any relation to his act of signing this check, or delivering it to the Hanover National Bank for collection. That check would have been collected as it was, whether Uhlman had been director of the Madison Square Bank or not; and no act of his as director had anything to do with the execution or collection of the check. The check, when presented, was paid by the St. Nicholas Bank under a contract which it had with the Madison Square Bank, and not as the agent of the Madison Square Bank. That was expressly determined in the case of *O'Brien v. Grant*, 146 N. Y. 163, 40 N. E. 871. Neither the Madison Square Bank, nor any of its officers, directors, or stockholders, transferred any of the property of the bank, or made any payment by the bank to the defendant. If Uhlman, as director of the bank, had obtained any money from the bank after it had refused to pay its obligations, either in payment of a debt or for any other consideration except in payment of its full value in cash to the bank, that transfer would have been void,

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under the first clause of the section of the banking law before referred to. But this payment to the defendant was not a payment by the bank, or by any of its officers, directors, or stockholders, and it therefore seems to me that the conclusion arrived at by the learned referee was correct, and the judgment should be affirmed.

NOTES.

Officer Using Knowledge to Obtain Preference.—A bank officer or director cannot use knowledge obtained of the insolvency of his bank to secure a preference over other creditors. *Lamb v. Pannell*, 28 W. Va. 663; *Lamb v. Cecil*, 28 W. Va. 653. So a director who, knowing through his official capacity of the approaching failure of his bank, draws out the deposit of a firm of which he is a member may be compelled to refund. *Swentzel v. Penn. Bank*, 147 Pa. St. 140, 30 Am. St. Rep. 718.

Preference of Directors—Right of Preference Upheld.—The directors and officers of a corporation having the same right as other persons to deal with the corporation, are entitled, upon the insolvency of the corporation, to receive payment for their claims in money or goods, provided, of course, that the debt is contracted in good faith, and that there is an absence of fraud on their part. *Duncombe v. Railroad Co.*, 84 N. Y. 190, 4 Am. & Eng. R. Cas. 190, 88 N. Y. 1, 13 Am. & Eng. R. Cas. 84; *Harts v. Brown*, 77 Ill. 226; *Wilkinson v. Bauerle*, 41 N. J. Eq. 635; *Gordon v. Preston*, 1 Watts. (Pa.) 386; *Kitchen v. Railway Co.*, 69 Mo. 224; *Oil Co. v. Marbury*, 91 U. S. 587; *Hospes v. Car Co.*, 48 Minn. 174, 36 Am. & Eng. Corp. Cas. 206.

If a director, officer, or stockholder, of a corporation deals with it in his individual capacity, the law will protect him as well as any other party. His relation to the corporation only goes to the question of the good faith of his transactions with it. *Smith v. Skeary*, 47 Conn. 47.

In this case a corporation transferred a quantity of its goods to two of its directors to be sold by them and the proceeds applied in payment of a joint claim of large amount which they had against it. The corporation was in fact insolvent, but it was presumed by the parties at the time that it was able to pay all its debts. The transaction was in entire good faith, and with no intention to defraud creditors. *Held*, that there was no principle of law that rendered the transaction fraudulent, or otherwise void.

While directors of a corporation are bound to discharge their duties prudently, deliberately and faithfully, and apply the assets of the corporation, in case of insolvency, for the benefit of creditors in preference to stockholders and other persons, personally or officially related to the corporation, they are not technical trustees, nor bound to apply the assets ratably among the general creditors. They may not only make preferences between creditors, but such preferences may be made in their own favor if they be creditors.

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But in such cases they must act with the utmost good faith. *Planters' Bank v. Whittle*, 78 Va. 737, 6 Am. & Eng. Corp. Cas. 298.

Where a creditor of a corporation holds its note secured by mortgage upon the corporate property, and also endorsed by its directors there is no principle of law which will compel him to proceed against the endorsers and surrender to other creditors the property which he holds as security, even though the corporation be insolvent. *Garrett v. Burlington Plow Co.*, 70 Iowa 697.

In this case an insolvent corporation mortgaged all of its real and personal property to a trustee to secure certain specific debts, and pledged all of its notes and accounts to another creditor to secure his claim, thus encumbering all of its property, but it was not the intention in either case to make an absolute conveyance of the property. *Held*, in addition to the above, that although the two transactions be regarded as one, they did not amount to an assignment for the benefit of creditors, which would be void because of preferences.

Directors and officers of a corporation who are also its creditors, may protect themselves from loss by the same means open to other creditors. The fact that one is an officer of a corporation does not deprive him of the right to enter into competition with other creditors in securing the payment of his just claim. *Buell v. Buckingham*, 16 Iowa 284; *Whitewell v. Warner*, 20 Vt. 425; *Merrick v. Pennsylvania Coal Co.*, 66 Ill. 472; *Hayward v. Pilgrim Society*, 21 Pick. (Mass.) 270; *Hoyle v. P. & M. R. Co.*, 54 N. Y. 314.

An officer of a corporation, who is also its creditor, may attach its property for the collection of his debt, though he knows of its failing circumstances, but is in no way responsible therefor, and though he knows that his attachment will precipitate a crisis in its affairs; and his attachment will be good as against subsequent attaching creditors and mortgagees. *Rollin v. Shaver Wagon & Carriage Co.*, 80 Iowa 380, and cases cited.

Same—Right Denied.—Directors of a corporation who are also its creditors have no right to take advantage of their position as directors to secure preferences for themselves as creditors, especially where other creditors would be injured by such action. *Haywood v. Lincoln Lumber Co.*, 64 Wis. 639; *Richards v. New Hampshire Ins. Co.*, 43 N. H. 263; *Howe v. Sandford Fork & Tool Co.*, 44 Fed. Rep. 231; *Koehler v. Black River Falls Iron Co.*, 67 U. S. 715.

Upon this question the circuit court of the United States in *Lippincott v. Shaw Carriage Co.*, 25 Fed. Rep. 577, says: "While it is generally conceded that a corporation, notwithstanding insolvency, continues possessed of a general power of management of its affairs, and like natural persons may give preferences by way of payment or security to one creditor or class of creditors, over others; yet in close analogy to the rule which forbids the giving of preferences by individual debtors for the purpose of securing, or in such manner as to secure advantage or benefit to themselves, and in manifest accord with the tendency of judicial opinion as expressed upon consideration of kindred questions, it has been decided in a number of cases that preferences given by insolvent corporations in such manner as to be of special benefit to the directors or managing agents, or any of them, will be set aside. This, as it seems to me, is the salutary rule, and the only rule which can be administered with uniformity and fairness. Indeed, it has been often said by

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judges, including those of the federal supreme court, that the property of an insolvent corporation is a trust fund, and the directors trustees for the creditors; and if this were strictly so it is manifest that no preferences whatever could be allowed between creditors standing in the same relation to the fund. These statements are, however, true in a qualified sense, and lead logically, if not necessarily, to the conclusion that in such cases the directors, if they give preferences, must do it unbiased by considerations of personal advantage or gain. In some of the cases in which the question has recently arisen, the subject has been so fully considered upon authority and principle as to make a further discussion or review at this time unnecessary. The following cases are all, in some degree, relevant, and a few of the first named directly in point: *Bradley v. Farewell*, 1 Holmes 433; *Corbett v. Woodward*, 5 Sawy. 403; *Stout v. Yaeger*, 4 McCrary 486, S. C. 13 Fed. Rep. 802; *Trustees v. Bousseux*, 3 Fed. Rep. 817; *Coons v. Tome*, 9 Fed. Rep. 532; *Richards v. New Hampshire Co.*, 43 N. H. 263; *Duncomb v. Railroad Co.*, 88 N. Y. 1, 13 Am. & Eng. R. Cas. 84; *Hopkins' Appeal*, 90 Pa. St. 76; *Robins v. Embry*, 1 Smedes & M. 207; *Curran v. Arkansas*, 15 How. 304; *Koehler v. Black River F. I. Co.*, 2 Black 715; *Drury v. Cross*, 7 Wall. 299; *Railroad Co. v. Howard*, *Id.* 392; *Sawyer v. Hoag*, 17 Wall. 610; *Jackson v. Ludeling*, 21 Wall. 616; *County of Morgan v. Allen*, 103 U. S. 498; *Scovill v. Thayer*, 105 U. S. 143; *Patterson v. Lynde*, 106 U. S. 519; *Cook Co. Nat. Bank v. U. S.*, 107 U. S. 445; *Osgood v. King*, 42 Iowa 478; *Goodin v. Cincinnati, etc.*, 18 Ohio St. 182; *Swepson v. Bank*, 9 Lea (Tenn.) 713, 3 Am. & Eng. Corp. Cas. 70; *Marr v. Union Bank*, 4 Cold. 486; *Tayl. P. Corp.* §§ 6, 12, 634, 668, 759; *Emporium R. E. Co. v. Emrie*, 54 Ill. 345. *Cited by defendants to the contrary*: *Planters' Bank v. Whittle*, 78 Va. 737, 6 Am. & Eng. Corp. Cas. 293; *Buell v. Buckingham*, 16 Iowa 234; *Gordon v. Preston*, 1 Watts 385; *Railroad Co. v. Claghorn*, 1 Spear Eq. 545; *Whitwell v. Warner*, 20 Vt. 452; *Sargent v. Webster*, 13 Metc. 497; *Ashhurst's Appeal*, 60 Pa. St. 290; *Catlin v. Eagle Bank*, 6 Conn. 233; *Smith v. Skeary*, 47 Conn. 47; *Savings Bank v. Bates*, 8 Conn. 504; *Pondville Co. v. Clark*, 25 Conn. 97; *Ringo v. Biscoe*, 8 Eng. (Ark.) 563; *Dana v. Bank U. S.*, 5 Watts & S. 223."

In *Hill v. Pioneer Lumber Co.*, 113 N. Car. 173, it was held that a director could not take advantage of his superior means of information as to the condition of the corporation to secure a debt due him from the corporation, either by a confession of judgment or otherwise.

As long as a private corporation for profit remains solvent, its directors may, with the knowledge of the stockholders, deal with the corporation, loan it money, take security, or buy property for it the same as a stranger. During its solvency, the directors are the agents or trustees of the stockholders, and owe no duties and obligations to others, but the instant the corporation becomes insolvent, its assets become a trust fund for the payment of its creditors, and the directors can no longer deal with them for their own advantage, or in such way as to gain priority for themselves over other creditors. *Roseboom v. Whittaker*, 132 Ill. 81, 28 Am. & Eng. Corp. Cas. 478.

It was shown in this case that a majority of the directors of a private corporation, having knowledge of its insolvency, paid certain debts of the corporation upon which they were liable as guar-

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antors, and took the judgment note of the company therefor due one day after date without grace, upon which note judgment was confessed in favor of such directors, and all the property of the company was levied on by execution issued on such judgment. *Held*, that the acts of the directors in attempting to secure themselves at the expense of other creditors were fraudulent and void, and were properly set aside at the instance of such other creditors.

Pending an action brought against a corporation for injuries resulting from the negligence of the corporation, the latter, at that time being insolvent, mortgaged its property to its directors for money advanced by them for its purposes. The plaintiff in the action, after recovering judgment, levied on the corporate property, and filed a bill in equity to set aside the said mortgage. *Held*, that the plaintiff was entitled to have the mortgage declared void as against him. *Olney v. Conanicut Land Co.*, 16 R. I. 597, 26 Am. & Eng. Corp. Cas. 485.

It has been said that after a business corporation ceases to be a "going concern," and is no longer possessed of vitality enough to survive and continue its business, and the board of directors conclude that they can go no further, the directors then become *eo instanti* by that very act, trustees for the benefit both of the stockholders and the creditors, and it is not within the power or competency of the trustees to prefer themselves, the board of directors, as creditors of the concern. Their relation becomes one of trustee to the whole property, and they must administer the whole assets of the corporation for the benefit of all the creditors, to be distributed *pari passu* equally between them; and they cannot, after the corporation reaches that juncture and condition of affairs, make a preference for themselves. *Consolidated Tank Line Co. v. Kansas City Varnish Co.* (C. C.), 43 Fed. Rep. 204.

In this case, as reported in 45 Fed. Rep. 7, the directors of a corporation financially embarrassed, who held claims against the corporation, caused the notes of the company, payable to themselves, to be drawn and antedated, and had them discounted by the defendant bank: thereupon they executed a deed of trust of all the assets of the company as security for the notes so discounted among other liabilities. In a proceeding brought by unsecured creditors to set aside this deed of trust, it was held that being a security for debts upon which the directors were personally liable as endorers, the transaction was in effect a preference to themselves, and therefore fraudulent and void.

An insolvent corporation, being indebted to its officers and directors, the latter executed the notes of the corporation in their own favor, and having obtained judgment thereon by default, issued execution upon the judgment. In the distribution of the proceeds of the sheriff's sale of the personal property of the corporation under the execution, it was held that this conduct of the officers was a fraud in law, which gave them no preference over general creditors. *Hopkin's & Johnson's Appeal*, 90 Pa. St. 69.

First Nat. Bank of Concord, N. H. v. Hawkins

FIRST NAT. BANK OF CONCORD, N. H.

v.

HAWKINS.

(*Supreme Court of the United States, May 15, 1899.*)

Holding Stock in Another National Bank—Ultra Vires.*—It is *ultra vires* on the part of a national bank to purchase with its surplus funds, as an investment, and hold as such, shares of stock in another national bank.

Same—Same—Estoppel.—A national bank which has purchased, as an investment, and holds as such, shares of stock in another national bank is not estopped in an action by the receiver of the latter to enforce the stockholders' liability arising under an assessment by the comptroller of the currency to protect itself by alleging the unlawfulness of its own action in so purchasing and holding the stock.

ERROR by defendant to the United States Circuit Court of Appeals for the First Circuit. *Reversed.*

In May, 1895, Edward Hawkins, as receiver of the Indianapolis National Bank, brought a suit in the circuit court of the United States for the district of New Hampshire against the First National Bank of Concord. At the trial a jury was waived, and the court found the following facts:

Case Stated.

"The plaintiff is receiver of the Indianapolis National Bank of Indianapolis, which bank was duly organized and authorized to do business as a national banking association. The bank was declared insolvent and ceased to do business on the 24th day of July, 1893. The plaintiff was duly appointed and qualified receiver of the bank on the 3d day of August, 1893, and took possession of the assets of the bank on the 8th day of the same month.

"The capital stock of the bank was 3,000 shares, of the par value of \$100 each. On the 25th day of October, 1893, an assessment was ordered by the comp-

*See note at end of case.

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troller of \$100 per share on the capital stock of the bank to enforce the individual liability of stockholders, and an order made to pay such assessment on or before the 25th day of November, 1893; and the defendant was duly notified thereof.

"The defendant, being a national banking association, duly organized and authorized to do business at Concord, N. H., on the 21st day of May, 1889, with a portion of its surplus funds, purchased of a third party, authorized to hold and make sale, 100 shares of the stock of the Indianapolis National Bank, as an investment, and has ever since held the same as an investment. The defendant bank has appeared upon the books of the Indianapolis bank as a shareholder of 100 shares of its stock from the time of such purchase to the present time. During such holding the defendant bank received annual dividends declared by the Indianapolis bank prior to July, 1893. The defendant has not paid said assessment, or any part thereof."

After argument, the court, on July 28, 1896, entered judgment in favor of the plaintiff for the sum of \$11,646.67 and costs. From that judgment a writ of error from the United States circuit court of appeals for the First circuit was sued out, and by that court the judgment of the trial court was on March 5, 1897, affirmed. 33 U. S. App. 747, 24 C. C. A. 444, and 79 Fed. 51. From the judgment of the circuit court of appeals a writ of error was allowed to this court.

Frank S. Streeter, for plaintiff in error.

John G. Carlisle and *John W. Kern*, for defendant in error.

MR. JUSTICE SHIRAS, after stating the facts in the foregoing language, delivered the opinion of the court.

The questions presented for our consideration in this case are whether one national bank can lawfully acquire and hold the stock of another as an investment, and, if not, whether, in the case of such an actual purchase, the bank is estopped to deny its liability, as an

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apparent stockholder, for an assessment on such stock ordered by the comptroller of the currency.

By Section 5136 of the Revised Statutes a national banking association is authorized "to exercise by its board of directors, or duly authorized officers and agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking : by discounting and negotiating promissory notes, drafts, bills of exchange and other evidences of indebtedness ; by receiving deposits ; by buying and selling exchange, coin and bullion ; by loaning money on personal security ; and by obtaining, issuing and circulating notes according to the provisions of this title."

In construing this provision, it was said by this court in *First Nat. Bank of Charlotte v. National Exch. Bank of Baltimore*, 92 U. S. 122, that "dealing in stocks is not expressly prohibited, but such prohibition is implied from the failure to grant the power. In the honest exercise of the power to compromise a doubtful debt owing to a bank, it can hardly be doubted that stocks may be accepted in payment and satisfaction, with a view to their subsequent sale or conversion into money, so as to make good or reduce an anticipated loss. Such a transaction would not amount to a dealing in stocks."

And in the recent case of *Bank v. Kennedy*, 167 U. S. 362, 17 Sup. Ct. 831, it was said to be "settled that the United States statutes relative to national banks constitute the measure of the authority of such corporations, and that they cannot rightfully exercise any powers except those expressly granted, or which are incidental to carrying on the business for which they are established. No express power to acquire the stock of another corporation is conferred upon a national bank, but it has been held that, as incidental to the power to loan money on personal security, a bank may, in the usual course of doing such business, accept stock of another corporation as collateral, and by the enforcement of its rights as pledgee it may become the owner of the collateral, and be subject to liability as

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other stockholders. So, also, a national bank may be conceded to possess the incidental power of accepting in good faith stock of another corporation as security for a previous indebtedness. It is clear, however, that a national bank does not possess the power to deal in stocks. The prohibition is implied from the failure to grant the power."

Accordingly it was held in that case that a provision of the laws of the state of California which declared a liability on the part of stockholders to pay the debts of a savings bank, in proportion to the amount of stock held by each, could not be enforced against a national bank, in whose name stood shares of stock in a savings bank; it being admitted that the stock of the savings bank had not been taken as security, and that the transaction by which the stock was placed in the name of the national bank was one not in the course of the business of banking, for which the bank was organized.

It is suggested by the learned circuit judge, in his opinion overruling a petition for a rehearing in the circuit court of appeals, that the question considered in the case of *Bank v. Kennedy* was the liability of a national bank as a stockholder in a state savings bank, while the question in the present case is as to its liability as a stockholder in another national bank, and that, therefore, it does not follow, beyond question, that the decision in the former case is decisive of the present one. 50 U. S. App. 178, 27 C. C. A. 679, and 82 Fed. 301.

No reason is given by the learned judge in support of the solidity of such a distinction, and none occurs to us. Indeed, we think that the reasons which disqualify a national bank from investing its money in the stock of another corporation are quite as obvious when that other corporation is a national bank as in the case of other corporations. The investment by national banks of their surplus funds in other national banks, situated, perhaps, in distant states, as in the present case, is plainly against the meaning and policy of the

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statutes from which they derive their powers, and evil consequences would be certain to ensue if such a course of conduct were countenanced as lawful. Thus, it is enacted in section 5146 that "every director must, during his whole term of service, be a citizen of the United States, and at least three-fourths of the directors must have resided in the state, territory or district in which the association is located for at least one year immediately preceding their election, and must be residents therein during their continuance in office."

One of the evident purposes of this enactment is to confine the management of each bank to persons who live in the neighborhood, and who may for that reason be supposed to know the trustworthiness of those who are to be appointed officers of the bank, and the character and financial ability of those who may seek to borrow its money. But if the funds of a bank in New Hampshire, instead of being retained in the custody and management of its directors, are invested in the stock of a bank in Indiana, the policy of this wholesome provision of the statute would be frustrated. The property of the local stockholders, so far as thus invested, would not be managed by directors of their own selection, but by distant and unknown persons. Another evil that might result, if large and wealthy banks were permitted to buy and hold the capital stock of other banks, would be that in that way the banking capital of a community might be concentrated in one concern, and business men be deprived of the advantages that attend competition between banks. Such accumulation of capital would be in disregard of the policy of the national banking law, as seen in its numerous provisions regulating the amount of the capital stock, and the methods to be pursued in increasing or reducing it. The smaller banks in such a case would be in fact, though not in form, branches of the larger one.

Section 5201 may also be referred to as indicating the policy of this legislation. It is in the following terms: "No association shall make any loan or discount on the security of the shares of its own capital stock, nor

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be the purchaser or holder of any such shares, unless such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith ; and stock so purchased or acquired shall, within six months from the time of its purchase, be sold or disposed of at public or private sale ; or, in default thereof, a receiver may be appointed to close up the business of the association."

This provision forbidding a national bank to own and hold shares of its own capital stock would, in effect, be defeated, if one national bank were permitted to own and hold a controlling interest in the capital stock of another.

Without pursuing this branch of the subject further, we are satisfied to express our conclusion, upon principle and authority, that the plaintiff in error, as a national banking association, had no power or authority to purchase with its surplus funds, as an investment, and hold as such, shares of stock in the Indianapolis National Bank of Indianapolis.

The remaining question for our determination is whether the First National Bank of Concord, having, as a matter of fact, but without authority of law, purchased and held as an investment shares of stock in the Indianapolis National Bank, can protect itself from a suit by the receiver of the latter brought to enforce the stockholders' liability arising under an assessment by the comptroller of the currency by alleging the unlawfulness of its own action.

This question has been so recently answered by decisions of this court that it will be sufficient, for our present purpose, to cite those decisions, without undertaking to fortify the reasoning and conclusions therein reached.

In *Central Transp. Co. v. Pullman's Palace-Car Co.*, 139 U. S. 24, 11 Sup. Ct. 478, after an examination of the authorities, the conclusion was thus stated by MR. JUSTICE GRAY :

"It was argued on behalf of the plaintiff that, even

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Another National
Bank—Ultra
Viros.

Same—Same—
Estoppel.

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if the contract sued on was void, because *ultra vires* and against public policy, yet that, having been fully performed on the part of the plaintiff, and the benefits of it received by the defendant for the period covered by the declaration, the defendant was estopped to set up the invalidity of the contract as a defense to this action to recover the compensation agreed on for that period. But this argument, though sustained by decisions in some of the states, finds no support in the judgment of this court. * * * The view which this court has taken of the question presented by this branch of the case, and the only view which appears to us consistent with legal principles, is as follows:

“A contract of a corporation, which is *ultra vires* in the proper sense,—that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature,—is not voidable only, but wholly void and of no legal effect. The objection to the contract is not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not be authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it.

“When a corporation is acting within the general scope of the powers conferred upon it by the legislature, the corporation, as well as persons contracting with it, may be estopped to deny that it has complied with the legal formalities which are prerequisites to its existence or to its action, because such requisites might in fact have been complied with. But, when the contract is beyond the powers conferred upon it by existing laws, neither the corporation nor the other party to the contract can be estopped, by assenting to it or by acting upon it, to show that it was prohibited by those laws.”

The principles thus asserted were directly applied in the case of *Bank v. Kennedy*, 167 U. S. 367, 17 Sup.

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Ct. 833, where the question and the answer were thus stated by MR. JUSTICE WHITE:

"The transfer of the stock in question to the bank being unauthorized by law, does the fact that, under some circumstances, the bank might have legally acquired stock in the corporation, estop the bank from setting up the illegality of the transaction?"

"Whatever divergence of opinion may arise from conflicting adjudications in some of the state courts, in this court it is settled in favor of the right of the corporation to plead its want of power; that is to say, to assert the nullity of an act which is an *ultra vires* act. The cases recognize as sound doctrine that the powers of corporations are such only as are conferred upon them by statute."

There is then quoted a passage from the decision of the court in *McCormick v. Bank*, 165 U. S. 549, 17 Sup. Ct. 436, as follows:

"The doctrine of *ultra vires*, by which a contract made by a corporation beyond the scope of its corporate powers is unlawful and void, and will not support an action, rests, as this court has often recognized and affirmed, upon three distinct grounds: The obligation of any one contracting with a corporation to take notice of the legal limits of its powers, the interest of the stockholders not to be subject to risks which they have never undertaken, and, above all, the interest of the public that the corporation shall not transcend the powers conferred upon it by law."

The conclusion reached was thus expressed:

"The claim that the bank, in consequence of the receipt by it of dividends on the stock of the savings bank, is estopped from questioning its ownership and consequent liability, is but a reiteration of the contention that the acquiring of stock by the bank, under the circumstances disclosed, was not void, but merely voidable. It would be a contradiction in terms to assert that there was a total want of power by any act to assume the liability, and yet to say that by a particular act the liability resulted. The transaction,

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being absolutely void, could not be confirmed or ratified."

In the present case it is sought to escape the force of these decisions by the contention that the liability of the stockholder in a national bank to respond to an assessment in case of insolvency is not contractual, but statutory.

Undoubtedly the obligation is declared by the statute to attach to the ownership of the stock, and in that sense may be said to be statutory. But as the ownership of the stock, in most cases, arises from the voluntary act of the stockholder, he must be regarded as having agreed or contracted to be subject to the obligation.

However, whether, in the case of persons *sui juris*, this liability is to be regarded as a contractual incident to the ownership of the stock, or as a statutory obligation, does not seem to present a practical question in the present case.

If the previous reasoning be sound, whereby the conclusion was reached that, by reason of the limitations and provisions of the national banking statutes, it is not competent for an association organized thereunder to take upon itself, for investment, ownership of such stock, no intention can be reasonably imputed to congress to subject the stockholders and creditors thereof, for whose protection those limitations and provisions were designed, to the same liability by reason of a void act on the part of the officers of the bank as would have resulted from a lawful act.

It is argued on behalf of the receiver that the object of the statute was to afford a speedy and effective remedy to the creditors of a failed bank, and that this object would be defeated in a great many cases if the comptroller were obliged to inquire into the validity of all the contracts by which the registered shareholders acquired their respective shares.

The force of this objection is not apparent. It is doubtless within the scope of the comptroller's duty, when informed by the reports of the bank that such

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an investment has been made, to direct that it be at once disposed of; but the comptroller's act in ordering an assessment, while conclusive as to the necessity for making it, involves no judgment by him as to the judicial rights of parties to be affected. While he, of course, assumes that there are stockholders to respond to his order, it is not his function to inquire or determine what, if any, stockholders are exempted.

The judgment of the circuit court of appeals is reversed. The judgment of the circuit court is also reversed, and the cause is remanded to that court with directions to enter a judgment in conformity with this opinion.

NOTE.

Banks—Power to Deal in Stocks.—Dealing in stocks is not within the powers of a bank. *Franklin Bank v. Commercial Bank*, 36 Ohio St. 350, 38 Am. Rep. 594; *Charlotte First Nat. Bank v. Nat. Exch. Bank*, 92 U. S. 122, 39 Md. 600; *Planters' Bank v. Sharp*, 6 How. (U. S.) 322; *Bank of Commerce v. Hart*, 37 Neb. 197, 40 Am. St. Rep. 479; *Sackett's Harbor Bank v. Lewis County Bank*, 11 Barb. (N. Y.) 213; *Nassau Bank v. Jones*, 95 N. Y. 115, 47 Am. Rep. 14; *Weckler v. Hagerstown First Nat. Bank*, 42 Md. 582, 20 Am. Rep. 95; *Franklin Co. v. Lewiston Sav. Inst.*, 68 Me. 43, 28 Am. Rep. 9.

But it may receive stock as security for, or in payment of a debt. *Tracy v. Talmage*, 14 N. Y. 162, 67 Am. Dec. 132; *Talmage v. Pell*, 7 N. Y. 328; *Bank Comm'rs v. St. Lawrence Bank*, 7 N. Y. 513.

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NEEDLES NAT. BANK *et al.*

(*Circuit Court of Appeals, Ninth Circuit, May 15, 1899.*)

National Banks—Contract of Guaranty—Ultra Vires.*—It is *ultra vires* on the part of a national bank to guarantee checks drawn on it by one having no funds deposited with the bank.

Corporations—Ultra Vires†—Estoppel.—A corporation is estopped to contend that its contract was *ultra vires* only when it seeks to retain unjustly the fruits of the contract which has been performed by the other party.

*See note at end of case.

†See notes, 1 Banking Cas. 36 *et seq.*

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Right to Recover on Drafts Executed to Plaintiff under Ultra Vires Contract.—The defendant national bank guarantied checks drawn on it by one having no funds to his credit in such bank; and transmitted to plaintiff, in whose favor the checks were drawn, and the contract of guaranty made, in exchange for the checks, drafts drawn by it upon the C. bank, which had no funds from which they could be paid; and defendant provided for their payment by drawing counter drafts at the same time upon the drawer of the checks payable at the C. bank. The counter drafts were not paid, and the drafts sent in exchange for the checks were dishonored. *Held*, that the last mentioned drafts, having been executed to plaintiff under the void contract of guaranty, were null and void in the hands of plaintiff.

ERROR by plaintiff to the Circuit Court of the United States for the Southern District of California. *Affirmed*.

Abner T. Bowen sued the Needles National Bank upon four causes of action, the first, second, and third of which were upon bills of exchange for \$8,775, \$8,300, and \$5,364, which it was alleged in the complaint were drawn by the defendant at its place of business in the state of California upon the Chase National Bank, of New York, and payable to the order of the plaintiff under the name of A. T. Bowen & Co., which bills of exchange had been dishonored by the drawee; and for a fourth cause of action the plaintiff alleged further that the defendant was indebted to him upon a check for \$3,500, drawn by Isaac E. Blake upon the defendant bank, and payable to the order of the plaintiff. Upon the issues created by the answer the cause was tried before the court without a jury, and the court found for the defendant. 87 Fed. 430. No bill of exceptions is presented in the record, but it is contended by the plaintiff in error that upon the findings of fact made by the court the judgment should have been for the plaintiff. The findings are, in substance, as follows:

(1) That the defendant executed and delivered to the plaintiff the instruments called "bills of exchange" in the first, second, and third causes of action for the several amounts following, to wit, September 10, 1894, \$8,775; September 12, 1894, \$8,300; September 18,

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1894, \$5,364; and that said bills of exchange were drawn upon the Chase National Bank, of New York.

(2) That neither at the time of the drawing of said drafts nor at the time of their receipt by the plaintiff were there funds in the hands of the drawee to pay the same; that said drafts were not presented to the drawee for acceptance or payment.

(3) That the defendant provided for the payment of said drafts by drawing counter drafts at the same time upon Isaac E. Blake, payable at said Chase National Bank; that said counter drafts were not paid, but from the prior course of dealing between plaintiff and defendant and the said Chase National Bank and the said Blake the defendant had reason to believe, and did believe, that they would be paid.

(4) That the said drafts or bills of exchange mentioned in the first finding were made and transmitted by defendant to plaintiff in exchange for checks drawn by said Blake in favor of plaintiff and upon the defendant bank; that said Blake had no funds to his credit in the defendant bank, either at the time of drawing said checks or at the time of their presentation for payment.

(5) That the plaintiff is a citizen and resident of the state of New York doing business under the name and style of A. T. Bowen & Co., and the defendant is a national banking corporation organized under the laws of the United States.

(6) That prior to April 25, 1894, the plaintiff had advanced moneys to the said Blake upon checks drawn by him upon the defendant bank, and, being unwilling to advance further sums without some guaranty from the defendant, the latter, on said April 25, 1894, executed and delivered to the plaintiff the following telegram and letter:

"To A. T. Bowen & Co., 71 Broadway, New York: We will pay checks signed 'Isaac E. Blake, by W. L. Beardsley.' The Needles National Bank."

"A. T. Bowen & Co., New York City—Gentlemen: We hereby beg leave to confirm our telegram to you of even date: 'We will pay checks signed 'Isaac E.

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Blake, by W. L. Beardsley,"' signed 'Needles National Bank.'

"Yours, truly,

W. S. Greenlee, Cashier."

That on August 22, 1894, the said bank sent the plaintiff the following letter :

"A. T. Bowen & Co., New York City—Gentlemen: I am in receipt of telegraphic communication from Chase National Bank that our draft No. 2,200, for \$7,500, payable to the order of Bowen & Co., has been refused payment until advices received from us guarantying the amount received. I immediately guarantied the amount to be \$7,500.00, and I trust I have put you to no great inconvenience. It is simply a clerical error, which happens to us all some time or other, and in future we will endeavor to be more careful. I have telegraphed you to please pardon our error, and that we wish you to still continue your friendly relations with Mr. Blake and Mr. Beardsley, and that we guaranty absolutely the payment of Mr. Blake's checks as heretofore. I am truly sorry the mistake has occurred, and can venture the assurance that it will not happen again. The Keystone mine has just uncovered a large body of high-grade ore, and, if the vein continues as it is now for the next thirty days, it will make a big showing. Again asking your pardon. I remain, with best wishes,

"Very truly yours, W. S. Greenlee, Cashier."

(7) That on the 4th, 5th, 10th, and 11th days of September, 1894, respectively, upon checks drawn by the said Blake upon the defendant bank, the plaintiff advanced said Blake the following sums of money: \$8,750, \$8,300, \$5,300, \$3,500, and transmitted the checks to the defendant for payment.

(8) That in exchange for the checks for the first three sums of money the defendant transmitted to the plaintiff the bills of exchange mentioned in the first finding above, and returned to the plaintiff the fourth check, for \$3,500, unpaid.

(9) That at the time of drawing said checks and at the time of their presentation to the defendant bank

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the said Blake had no funds whatever on deposit with the bank with which to pay the same, nor did he have any funds on deposit with the bank at the time when said letters and telegrams were sent, or at any time thereafter.

(10) That the bills of exchange mentioned in the first finding are in fact checks, and that defendant bank suffered no injury by the failure of the plaintiff to present the same to the said Chase National Bank for payment.

(11) That at the time of the drawing of said checks the plaintiff had constructive notice that the said Blake had no funds on deposit with the defendant bank to meet the same, and knew that the defendant was a national bank.

Upon these findings of fact the court found as conclusions of law that the undertaking of the Needles National Bank to guaranty the checks of Blake was *ultra vires*, and was void; and that the bills of exchange, having been made and executed to plaintiff under such void contract are null and void in the hands of the plaintiff, and that no cause of action can arise thereon.

John D. Works and *Bradner W. Lee*, for plaintiff in error.

Henry C. Dillon and *Eber T. Dunning*, for defendants in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

It may be stated in general that no banking corporation has the power to become a guarantor of the obligation of another, or to lend its credit to any person or corporation, unless its charter or governing statute expressly permits it. *Farmers' & Mechanics' Bank v. Butchers' & Drovers' Bank*, 16 N. Y. 125; *Morford v. Bank*, 26 Barb. 568; *Thomp. Corp.* § 5721. Under section 5136 of the Revised Statutes,

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national banking associations are given the power to "make contracts" and "to exercise by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing, and circulating notes according to the provisions of this title." There is in these provisions no grant of power to guaranty the debt of another, nor can such guaranty be said to be incidental to the business of banking. It has been so held in *Seligman v. Bank*, 3 Hughes, 647, Fed. Cas. No. 12,642, *Norton v. Bank*, 61 N. H. 589, and *Bank v. Pirie*, 27 C. C. A. 171, 82 Fed. 799. An apparent exception is recognized in the case of the discount of promissory notes by national banks which may be transferred with a guaranty, but it rests upon the ground that the guaranty of such paper is but an ordinary incident to its transfer in the course of banking. In *People's Bank v. National Bank*, 101 U. S. 181, the court said: "To hand over with an indorsement and guaranty is one of the commonest modes of transferring the securities named." There can be no doubt that the guaranty in the present case was *ultra vires*. It was aside and apart from the business of banking. The case is not that of an officer of a bank exceeding the powers delegated to him, but it is a case where the banking association itself has exercised powers in excess of those which were conferred upon it by statute. The plaintiff, equally with the defendant bank, was bound to take notice of the statute. He had notice also that there were no funds in the bank to meet the checks, and he knew that the contract was one of guaranty pure and simple. The transaction cannot be deemed a certification of checks, as urged by the plaintiff in error. The checks were not certified.

National Banks -
Contract of Guar-
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They did not bear the acknowledgment of the bank of funds in its possession equal in amount to the checks, and available for their payment. The certification of checks is in the line of banking business, and is not prohibited to national banks. The only prohibition is that the bank shall not certify a check unless the drawer has on deposit at the time sufficient money to meet the same. The penalty for violation of the prohibition is to render the bank liable to the forfeiture of its charter, and to have its affairs wound up. Rev. St. § 5208; *Thompson v. Bank*, 146 U. S. 240, 13 Sup. Ct. 66.

But the present case is complicated by the fact that the plaintiff in error relied upon the guaranty, and cashed the checks on the strength thereof. There is authority for holding that under such circumstances the bank is estopped to deny its liability on the guaranty, notwithstanding that the contract was *ultra vires*. *Thomp. Corp.* §§ 6017, 6025; *State Board of Agriculture v. Citizens' St. Ry. Co.*, 47 Ind. 407; *Insurance Co. v. McClelland*, 9 Colo. 11, 9 Pac. 771; *Oil Creek & A. R. R. Co. v. Pennsylvania Transp. Co.*, 83 Pa. St. 160. "The principle, properly understood and applied, extends to every case where the consideration of the contract has passed to the corporation from the other contracting party, which consideration may, on well-understood principles, consist either of a benefit to the corporation or of a prejudice or disadvantage to the other contracting party. It is therefore not strictly necessary to the proper application of the principle that the corporation has received a benefit from the contract, but it is sufficient that the other party has acted on the faith of it to his disadvantage; as where he has expended money on the faith of it." *Thomp. Corp.* § 6017. It is contended that this doctrine finds support in the language of decisions of the supreme court, as in *Hitchcock v. Galveston*, 96 U. S. 341, 351, where it was said:

"But the present is not a case in which the issue of the bonds was prohibited by any statute. At most,

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the issue was unauthorized. At most, there was a defect of power. The promise to give bonds to the plaintiffs in payment of what they undertook to do was, therefore, at furthest, only *ultra vires*; and in such a case, though specific performance of an engagement to do a thing transgressive of its corporate power may not be enforced, the corporation can be held liable on its contract. Having received benefits at the expense of the other contracting party, it cannot object that it was not empowered to perform what it promised in return."

And the court quoted with approval from the opinion in *State Board of Agriculture v. Citizens' St. Ry. Co.*, 47 Ind. 407, the following words:

"Although there may be a defect of power in the corporation to make a contract, yet, if a contract made by it is not in violation of its charter, or of any statute prohibiting it, and the corporation has, by its promise, induced a party relying on the promise, and in execution of the contract, to expend money, and perform his part thereof, the corporation is liable on the contract."

Also, in *Railway Co. v. McCarthy*, 96 U. S. 258, 267, where the court said:

"The doctrine of *ultra vires*, when invoked for or against a corporation, should not be allowed to prevail where it would defeat the ends of justice, or work a legal wrong."

While the language of these expressions of the court may be said to be sufficiently broad and inclusive to justify the contention of the plaintiff in error, the court, in its adjudications, has limited the application of the principle to cases in which a corporation has, by the plea of *ultra vires*, sought to retain unjustly the fruits of a contract which has been performed by the other party thereto. In all such cases the action has been maintained, not upon the contract, nor to enforce its terms, but upon an implied obligation resting upon the defendant resulting from the fact that it has received money or property which it ought either to return or make compensation for.

Corporations—
Ultra Vires—
Estoppel.

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In Salt Lake City v. Hollister, 118 U. S. 263, 6 Sup. Ct. 1059, it was said :

"The courts have gone a long way to enable parties who had parted with property or money on the faith of such contracts to obtain justice by recovery of the property or the money specifically, or as money had and received to plaintiff's use."

In Louisiana v. Wood, 102 U. S. 294, where a city had received money for bonds issued by it without authority, the court said :

"The only contract actually entered into is the one the law implies from what was done, to wit, that the city would, on demand, return the money paid to it by mistake."

In Parkersburg v. Brown, 106 U. S. 487, 1 Sup. Ct. 442, in a similar case, the court said :

"The enforcement of such right is not in affirmance of the illegal contract, but is in disaffirmance of it, and seeks to prevent the city from retaining the benefit which it has derived from the unlawful act."

These citations sufficiently illustrate the ground, and the only ground, on which the supreme court has held that corporations may be liable to the payment of money on account of contracts which they have entered into *ultra vires* of their charter, and which have been performed by the other party to the contract. The right to relief in such cases rests upon the fact that the defendant corporation has obtained an advantage which it cannot justly retain. The general doctrine by which the present case may be ruled is thus stated in the language of the court in Central Transp. Co. v. Pullman's Palace-Car Co., 139 U. S. 24, 59, 11 Sup. Ct. 478, 488 :

Right to Recover
on Drafts Execu-
ted to Plaintiff
under Ultra
Vires Contract.

"A contract of a corporation, which is *ultra vires* in the proper sense,—that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature,—is not voidable only, but wholly void, and of no legal effect. The objection to the

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contract is not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it."

In the same case it was said (139 U. S. 54, 11 Sup. Ct. 486) :

"It was argued on behalf of the plaintiff that, even if the contract sued on was void, because *ultra vires* and against public policy, yet that, having been fully performed on the part of the plaintiff, and the benefits of it received by the defendant, for the period covered by the declaration, the defendant was estopped to set up the invalidity of the contract as a defense to this action to recover the compensation agreed on for that period. But this argument, though sustained by decisions in some of the states, finds no support in the judgments of this court."

Later decisions of the supreme court have emphasized the views expressed in the foregoing quotations. *Navigation Co. v. Hooper*, 160 U. S. 514, 16 Sup. Ct. 379; *Union Pac. Ry. Co. v. Chicago, R. I. & P. Ry. Co.*, 163 U. S. 564, 16 Sup. Ct. 1173; *McCormick v. Bank*, 165 U. S. 538, 17 Sup. Ct. 433; *Bank v. Kennedy*, 167 U. S. 362, 17 Sup. Ct. 831.

In *Union Pac. Ry. Co. v. Chicago, R. I. & P. Ry. Co.*, Mr. CHIEF JUSTICE FULLER said :

"A contract made by a corporation beyond the scope of its powers, express or implied, on a proper construction of its charter, cannot be enforced or rendered enforceable by the application of the doctrine of estoppel."

In *McCormick v. Bank*, Mr. JUSTICE GRAY, speaking for the court, said :

"The doctrine of *ultra vires*, by which a contract made by a corporation beyond the scope of its corporate powers is unlawful and void, and will not support an action, rests, as this court has often recognized and

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affirmed, upon three distinct grounds : The obligation of any one contracting with a corporation to take notice of the legal limits of its powers ; the interest of the stockholders not to be subject to risks which they have never undertaken ; and, above all, the interest of the public that the corporation shall not transcend the powers conferred upon it by law."

In Bank v. Kennedy it was said :

"It would be a contradiction in terms to assert that there was a total want of power by any act to assume the liability, and yet to say that by a particular act the liability resulted. The transaction, being absolutely void, could not be confirmed or ratified."

In the case at bar the defendant bank is not in the position of having received the fruits of the unlawful contract. The plaintiff's money was paid, not to the bank, but to Blake. It is not shown that the bank received any benefit whatever from the payment. There is no ground, therefore, upon which it can be adjudged that the bank shall make restitution. The judgment will be affirmed.

ROSS, Circuit Judge (dissenting). I agree, and so held in the case of Flannagan v. Bank, 56 Fed. 959, that a national bank has not the power to guaranty the debt or obligation of a third party ; but, in my opinion, the findings of fact of the court below, upon which the present writ of error must be determined, do not present any such case. The complaint in the case counts upon four separate causes of action, each of the first three of which is upon a certain draft drawn by the defendant Needles Bank on the Chase National Bank, of New York, in favor of the plaintiff, doing business under the name of Bowen & Co., and delivered to the plaintiff, according to the findings, in exchange for a check of Blake drawn on the defendant bank, and discounted by Bowen & Co. The checks of Blake on the defendant Needles Bank in favor of Bowen & Co. were thus honored by the defendant bank, and the amounts thereof necessarily entered upon its books on the debit side of Blake's account. When the plaintiff presented and delivered those checks of Blake to the defendant

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Needles Bank, and received from the latter, in exchange therefor, its own drafts in the plaintiff's favor on the Chase National Bank, of New York, the plaintiff manifestly parted with all of its interest in those checks of Blake, holding in exchange therefor the obligations of the defendant bank. In respect to the first three causes of action, therefore, I am unable to see how, in view of the findings of fact, it can be properly held that the action is upon any guaranty of the debt or obligation of Blake. On the contrary, in respect to each of these three causes of action the defendant bank honored the checks of Blake drawn upon it, and in exchange for them issued its own obligations, upon which the first three causes of action rest. There is nothing in the findings of fact to the effect or tending to show — what seems to be assumed in the prevailing opinion — that Bowen & Co. knew that the drafts drawn in its favor by the defendant bank, and issued in exchange for Blake's checks upon the defendant bank, were only to be paid by means of drafts drawn by the defendant bank on Blake and in favor of the Chase National Bank, of New York. It seems to me that the effect of the decision here is to attach a condition to the drafts of the defendant bank sued upon, which is altogether unauthorized by any fact made to appear in the findings of the court below. According to the complaint as it appears in the record, the fourth cause of action is upon a check drawn by Blake "upon the plaintiff, A. T. Bowen & Co.," which, it is alleged, the defendant bank guaranteed. If the complaint in respect to this cause of action be so taken and considered, it is plain that in respect to it the action is upon a guaranty which the defendant bank was not empowered to make. But the word "upon" was probably inserted in the record by mistake in place of the words "in favor of," since the findings of fact are that this check was drawn upon the defendant bank and in favor of the plaintiff, Bowen & Co., and it is so treated in the opinion of the court below, as also in the opinion of this court. Thus considered, I am of opinion, in view of the findings of

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fact made by the court below, that in respect to this cause of action, also, the action is not upon any guaranty, but upon the direct promise of the defendant bank to pay the check so drawn by Blake upon it, upon the faith of which promise the plaintiff parted with his money. What I have said is based upon the findings of the court below, which, as I understand it, are to control the judgment of this court. In the opinion of the learned judge of the court below, however, reference is made to certain testimony given in the trial court tending to show that the plaintiff, Bowen & Co., did know that the drafts sued upon were to be paid by other drafts drawn by the defendant bank upon Blake in favor of the Chase National Bank, of New York, and were only to be paid in the event of Blake's paying those drafts, and that, in truth, all of the transactions in question constituted but the guaranty by the defendant bank of Blake's obligations, of which the plaintiff, Bowen & Co., had actual knowledge. The testimony thus alluded to in the opinion of the trial judge finds some support in the agreement executed by Blake on the 12th of September, 1894, which is set out in the findings of fact that were made by the court below. The evidence in the case may have been amply sufficient to justify findings to the effect that all of the transactions sued upon in reality constituted but the guaranty on the part of the defendant bank of the obligations of Blake, and that the plaintiff, Bowen & Co., had knowledge thereof. The difficulty is that the findings do not show this state of facts, and therefore I am of opinion that the judgment should be reversed, and the cause remanded for a new trial.

NOTE.

National Banks—Accommodation Indorsement—*Ultra Vires*.—It is not within the powers of a national bank to become an accommodation indorser. *Note*, 1 Banking Cas. 39; *Seligman v. Charlottesville Nat. Bank*, 3 Hughes (U. S.) 647; *Blair v. Mansfield First Nat. Bank*, 2 Flipp. (U. S.) 111; *Houghton v. Elkhorn First Nat. Bank*, 26 Wis. 663, 7 Am. Rep. 107; *Flannagan v. California Nat. Bank*, 56 Fed. Rep. 959; *Nat. Bank of Commerce v. Kansas City First Nat. Bank*, 61 Fed. Rep. 809.

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McDONALD

v.

CHEMICAL NAT. BANK.

(Supreme Court of the United States, May 22, 1899.)

Correspondent Banks—Refusal to Honor Check—Whether Act of Insolvency.—For a number of years there had been mutual and extensive dealings between the defendant bank and the "C" bank, in which each was acting for the other as correspondent banks for the making of collections, and the auditing of the proceeds thereof, and transmitting accounts of the same, including costs of protest and other expenses, and the "C" bank also kept an active deposit account with the defendant bank, and settlements on the basis of such accounts were made at periodic times during all such period, and any balance, mutually agreed to be charged or credited, was at such times credited or debited, as the fact might be, upon the books of each of the banks, to a new account, and the prior accounts thereby and in that manner adjusted and settled. *Held*, that a refusal on the part of the defendant bank to pay a check drawn on it by the "C" bank did not constitute an act of insolvency on the part of the "C" bank.

Same—Preferences—Power of Insolvent Bank to Make Payments.*

—It cannot be said that all payment made in the due course of business by a bank when its officers know its condition is that of actual insolvency are made in contemplation of insolvency, or with a view to prefer one creditor to another.

Same—Mailing Remittances—Subsequent Suspension—Delivery.

—The "C" bank, in the usual course of business between the two banks, at a time when it was largely indebted to the defendant bank on account of such business, mailed to the defendant bank certain checks and remittances, which did not reach the latter until the bank examiner had taken possession of the assets of the "C" bank. *Held*, that such mailing was a delivery to the defendant bank, whose property in such checks and remittances was not destroyed or impaired by a subsequent act of insolvency on the part of the "C" bank.

APPEAL by complainant from the United States Circuit Court of Appeals for the Second Circuit. *Affirmed.*

The bill alleged that the Capital National Bank on the 21st day of January, 1893, was insolvent and stopped

*See note at end of case.

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doing business, and that on the 22d day of January, 1893, the comptroller of the currency closed said bank and took possession of its assets and affairs; that for a period long prior to the 15th day of January, 1893, the said bank was insolvent, and its insolvency was known to all its officers; that ever since the 2d day of June, 1884, there had been mutual and extensive dealings between the two banks above named, in which each had acted for the other, as correspondent banks do, for the making of collections and the crediting of the proceeds thereof; that the Capital National Bank kept an active deposit account with the defendant; and that settlements on the basis of such accounts were made at periodic times during all said period, and any balance after the correction of errors, mutually agreed to be charged or credited, was at such periods credited or debited, as the fact might be, upon the books of each of said banks to a new account, and the prior accounts thereby and in that manner adjusted and settled.

That the defendant bank had refused to pay or honor the drafts drawn upon it by the Capital National Bank presented on or since January 21, 1893; that since January 22, 1893, the defendant bank had received many and large sums of money belonging to, and for the account of, the Capital National Bank, some of it being the sums of \$2,935.60, \$815.79, and \$735, from the officers of the Capital National Bank, and the rest from the third parties which remitted the same to the defendant for account of the Capital National Bank, and that, in particular, it had received on January 23, 1893, \$5,000 from the Packers' National Bank, and \$2,000 from the Schuster Hax National Bank, and divers other sums from others, on that day and since; that the defendant had refused to account for and pay over to the complainant the said collections. Wherefore it was prayed that an accounting be had, and that the defendant be ordered to pay over what might be thereby found due.

The defendant bank answered, admitting the preliminary allegations of the bill, but denying its knowledge

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of the insolvency of the Capital National Bank on or prior to January 21, 1893, but averring that up to the 23d day of January, 1893, it was informed and did believe that the said Capital National Bank was entirely solvent, and dealt with it and gave it credit as a solvent bank.

The answer denied that on and after January 21, 1893, it had ceased to pay and refused to pay all drafts drawn upon the defendant by the Capital National Bank, but admitted that on the 23d day of January, 1893, because of information then for the first time received of the struggling condition of said bank, the defendant bank did refuse to pay the drafts of the Capital National Bank, which was then indebted to the defendant in the sum of at least \$13,992.93 on balance of account, besides large amounts of negotiable paper, indorsed by the Capital National Bank, then held by, and previously purchased or discounted by, the defendant bank, and the proceeds of which had been credited to the account of the Capital National Bank, all of which transactions were averred to have been made in the usual course of business between the banks, and without any knowledge, notice, or belief on the part of the defendant bank that the Capital National Bank was insolvent, or in any danger of becoming so.

The answer denied that the defendant had since January 22, 1893, received many and large sums of money belonging to and for account of the Capital National Bank, but admitted that since January 21, 1893, it had received certain remittances and payments, in the form of checks or drafts, for account of the Capital National Bank, all which it had placed to the credit of the Capital National Bank, which had left the Capital National Bank indebted to the defendant bank in a large sum, in the form of balance of account and negotiable paper indorsed to the defendant by the Capital National Bank; and the answer alleged, on information and belief, that said remittances and payments were made by the Capital National Bank, or by other banks and bankers by the direction and order of said Capital

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National Bank, through the United States mails, and were so ordered, made, and remitted before the appointment of any receiver for said Capital National Bank, and before it ceased to pay its obligations or had suspended its usual and ordinary banking business, and that said remittances by said Capital National Bank, or by other banks and bankers, by it ordered to be made to the defendant, were made in the ordinary and accustomed course of business between the defendant and the National Capital Bank, and, when received by the defendant, were by it placed to the credit of the Capital National Bank.

The answer admitted that it had received the sums of \$2,935.60, \$815.79, \$735, \$5,000, and \$2,000 on the 23d day of January, 1893; that the said sums of \$2,935.60 and \$815.79 were remitted to the defendant on or about the 19th day of January, 1893, and the said sum of \$735 on or about the 20th day of January 1893, by the said Capital National Bank, which on said respective days deposited and delivered the same in the United States mail, in letters addressed to the defendant, in the usual and accustomed course of business, and before said Capital National Bank had suspended payment or stopped business, and before it was taken charge of by the receiver; that the said sum of \$5,000 was remitted to the defendant on or about the 19th day of January, 1893, by the Packers' National Bank, and the said sum of \$2,000 was remitted to this defendant by the Schuster National Bank on or about January 19, 1893, by being by said banks, respectively, deposited in the United States mail, in letters addressed to the defendant, in the usual course of business, and before the Capital National Bank suspended payment or stopped business, and before it was taken charge of by the receiver. And the answer alleged, on information and belief, that said remittances to it by the Packers' National Bank and the Schuster National Bank, respectively, were made in virtue of orders and directions previously given to them by said Capital National Bank, on or about Janu-

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ary 18, 1893, in the usual course of business between them and the Capital National Bank.

A replication was filed and evidence put in on behalf of the respective parties. It was stipulated that the Capital National Bank continued to transact the usual and ordinary business of a national bank up to the close of banking hours on January 21, 1893; that the ordinary mail time between Lincoln, Neb., and the city of New York is 50 hours; between Lincoln and South Omaha, Neb., where the Packers' National Bank is situated, is 2 hours and 40 minutes; between South Omaha and New York City, 48 hours and 37 minutes; between Lincoln and St. Joseph, Mo., where the Schuster Hax National Bank is located, is 7 hours and 28 minutes; and between St. Joseph and New York City is 50 hours and 55 minutes. The complainant put in evidence an account or statement, furnished by the defendant to the complainant, showing the transactions between the Capital National Bank and the Chemical National Bank from January 3, 1893, to January 27, 1893, showing a balance on the last day of \$13,317.94, against the Capital National Bank and in favor of the Chemical National Bank.

The complainant likewise put in evidence a draft drawn on January 13, 1893, by the Capital National Bank on the Chemical National Bank for \$5,000, to the order of T. M. Barlow, cashier, and a protest of said draft for nonpayment on January 17, 1893; also, a statement of various drafts drawn by the Capital National Bank on the Chemical National Bank, at different times, in favor of third parties, and protested for nonpayment on and after January 24, 1893. These protested drafts amounted to \$44,264.66.

The defendant called as a witness its cashier, William I. Quinlan, who testified that when the draft for \$5,000 to the order of T. M. Barlow, cashier, was presented and payment refused, the Capital National Bank had no deposits or funds on deposit with the Chemical National Bank, out of which such draft could be paid, and that the account of the Capital National Bank had

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been overdrawn for some time. The defendant put in evidence a letter dated January 19, 1893, from the Packers' National Bank, inclosing its draft for \$5,000 on the Fourth National Bank of New York, to be placed to the credit of the Capital National Bank, and letter, dated January 18, 1893, from the Schuster Hax National Bank, inclosing its draft for \$2,000 on the Chemical National Bank, to the credit of the account of the Capital National Bank.

Further evidence was put in by the respective parties, which it does not seem necessary to state.

On March 16, 1897, after argument, upon the pleadings and proofs, the circuit court dismissed the bill of complaint, with costs. An appeal was taken from this decree to the circuit court of appeals for the Second circuit, and on January 31, 1898, that court affirmed the decree of the circuit court. 28 C. C. A. 548, 84 Fed. 874. And from the decree of the circuit court of appeals an appeal was taken and allowed to this court.

Edward Winslow Paige, for appellant.

Geo. H. Yeaman, for appellee.

MR. JUSTICE SHIRAS, after stating the facts in the foregoing language, delivered the opinion of the court.

The Capital National Bank of Lincoln, Neb., was organized as a banking association under the laws of the United States in June, 1884, and continued to transact the usual and ordinary business of a national bank up to the close of banking hours on January 21, 1893. On January 22, 1893, a bank examiner took possession, and thereafter, about February 6, 1893, a receiver was duly appointed.

The Chemical National Bank of New York, a banking association organized under the laws of the United States, and doing business as such in the city of New York, carried on for some years a large business intercourse with the Capital National Bank. The receiver filed the bill in this case, seeking to make the Chemical National Bank account for certain moneys received by it after the suspension of the Capital National Bank.

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The nature of the intercourse between the two banks was thus described in a paragraph of the bill :

"Ever since the 2d day of June, 1884, there have been mutual and extensive dealings between the two banking associations above named, in which each was acting for the other, as correspondent banks do, for the making of collections, and the crediting of the proceeds thereof, and transmitting accounts of the same, including costs of protest and other expenses. and the Capital National Bank also kept an active deposit account with the defendant, and that settlements on the basis of such accounts were made at periodic times during all said period, and any balance, after the correction of errors, mutually agreed to be charged or credited, was at such periods credited or debited, as the fact might be, upon the books of each of said banks, to a new account, and the prior accounts thereby and in that manner adjusted and settled."

The complainant's case depends, under the evidence, on an application of the provisions of section 5242 of the Revised Statutes, which is as follows :

"All transfers of the notes, bonds, bills of exchange or other evidences of debt, owing to any national banking association, or of deposits to its credit: all assignments of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion or other valuable thing for its use or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void; and no attachment, injunction or execution shall be issued against such association or its property before final judgment in any suit, action or proceeding in any state, county or municipal court."

It appears in evidence that on January 18, 1893, the account of the Capital National Bank with the defend-

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ant bank was overdrawn to the amount of \$84,486.19, and that, by sundry remittances made, the amount overdrawn stood, on January 21, 1893, at the sum of \$25,515.32. It further appears that on January 18, 1893, the Schuster Hax National Bank of St. Joseph, Mo., remitted by mail \$2,000 to the defendant for the credit of the Capital National Bank; on January 19th the Packers' National Bank of South Omaha, Neb., remitted by mail to the defendant \$5,000 for the credit and advice of the Capital National Bank; on January 20th the Capital National Bank remitted to the defendant by mail a package of small items amounting to \$735, and a package amounting to \$2,935.60, and on the 21st a similar package amounting to \$833.64. On January 23d the defendant received the remittance of \$2,000 of the 18th, and of \$5,000, \$815.79, and \$2,935.60 of the 19th, and of the remittance of \$735 of the 20th; and on the 24th of January it received the remittance of \$833.04. With these remittances credited, the account of the Capital National Bank stood, on January 24, 1893, overdrawn \$13,317.94.

The claim of the complainant is to recover all the sums received by the defendant bank on January 23d and 24th, as having been transferred and received contrary to the statute. The bill of complaint contains no allegation of any act of insolvency prior to January 22, 1893, or of any payment made in contemplation of insolvency, or of any payment made with a view to prevent the application of the bank's assets in the manner prescribed in the statute, or of any payment made with a view to the preference of one creditor to another.

It is true that in the course of the trial it appeared that on the 17th day of January, 1893, the Chemical National Bank refused to pay a check for \$5,000 drawn on it by the Capital National Bank to the order of T. M. Barlow, and it is contended that such refusal by the Chemical National Bank is to be regarded as an act of insolvency on the part of the Capital National Bank. It is difficult to see any foundation for this contention

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in the mere fact that the Chemical National Bank refused on January 17th to make further advances on the credit of the Capital National Bank. Such refusal may have been occasioned by a shortage of money on the part of the bank in New York, and because its funds on that day were needed for other purposes, and was entirely consistent with the absolute solvency of the Nebraska bank.

Nor can a finding that the payments and remittances made to the Chemical National Bank on the dates above mentioned were made in contemplation of insolvency, and with an intent to prefer that bank, be based on the mere allegation that the Capital National Bank was actually insolvent, and that its insolvency must have been known to its officers. It is matter of common knowledge that banks and other corporations continue, in many instances, to do their regular and ordinary business for long periods, though in a condition of actual insolvency, as disclosed by subsequent events. It cannot surely be said that all payments made in the due course of business in such cases are to be deemed to be made in contemplation of insolvency, or with a view to prefer one creditor to another. There is often the hope that, if only the credit of the bank can be kept up by continuing its ordinary business and by avoiding any act of insolvency, affairs may take a favorable turn, and thus suspension of payments and of business be avoided.

Same—Preferences
—Power of Insol-
vent Bank to Make
Payments.

In the present instance there was not only no allegation of payments made in contemplation of insolvency, or with a view to prefer the Chemical National Bank, but there was no evidence that up to the closing hours of January 21, 1893, the Capital National Bank had failed to pay any depositor on demand, or had not met at maturity all its obligations. And the evidence fails to disclose any intention or expectation on the part of its officers to presently suspend business. It rather shows that, up to the last, the operations of the bank, and its transactions with the Chemical National Bank,

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were conducted in the usual manner. It may be that those of its officers who knew its real condition must have dreaded an ultimate catastrophe, but there is nothing to justify the inference that the particular payments in question were made in contemplation of insolvency, or with a view to prefer the defendant bank. The Chemical National Bank was no more preferred by these remittances several days before suspension than were the depositors whose checks were paid an hour before the doors were closed. Indeed, it is stipulated that the Capital National Bank continued to transact its usual and ordinary business up to the close of banking hours on January 21, 1893.

The view of the courts below was that these payments and remittances were not made in contemplation of insolvency, or with a view to prefer the Chemical National Bank, and our examination of the evidence has led us to the same conclusion.

It remains to consider another proposition very strongly pressed on behalf of the appellant, and that is that the moneys and checks remitted to the defendant bank which did not reach it till after the bank examiner had taken possession could not, in law, become the property of the defendant bank, but remained part of the assets of the insolvent bank, for which the defendant must account to the receiver, in order that the proceeds may be ratably divided among the creditors.

Same—Mailing
Remittances—Sub-
sequent Suspension—
Delivery.

It is said that the taking possession of the bank by the comptroller of the currency is a distinct declaration of insolvency, and cases are cited in which it has been said by this court that the business of the bank must stop when insolvency is declared (*White v. Knox*, 111 U. S. 784, 4 Sup. Ct. 686), and that the state of case where the claim sought to be offset is acquired after the act of insolvency cannot sustain such a transfer, because the rights of the parties become fixed as of that time (*Scott v. Armstrong*, 146 U. S. 499, 13 Sup. Ct. 148).

The law is doubtless as thus stated, but does it apply to the present case?

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It is conceded in his brief by the learned counsel of the appellee that if the drafts and checks had been deposited in the mail pursuant to any agreement, or even if the defendant had known anything about them, they might have been regarded as the property of the Chemical National Bank as of the date of mailing. But he urges that this was only the case of a bank sending the checks of other parties to its agents for collection and deposit; that it could have sent them to any other agent, had it pleased; and that, after it had once put them in the mail, it could have taken them out again. And queries are put as to which bank would have suffered the loss if the checks had been destroyed in transit or if they had proved to be worthless.

But here we have the case, not of a casual remittance, but of remittances sent from time to time, and frequently, during a long course of business between the banks concerned. There may have been no special agreement as to each particular remittance, but there was plainly a general agreement that remittances were to be made by mail, and that their proceeds were not to be returned to the Capital National Bank, but were to be credited to its constantly overdrawn account.

Whose the loss might be, if the packages were destroyed *in transitu*, or if the checks proved uncollectible, are not questions that concern us now. It is sufficient for present purposes to say that the inference is warranted that it was understood between the parties that these remittances were to be made through the mails, and that they were in the nature of payments on general account.

Nor can it be conceded that, except on some extraordinary occasion, and on evidence satisfactory to the post-office authorities, a letter once mailed can be withdrawn by the party who mailed it. When letters are placed in a post office, they are within the legal custody of the officers of the government, and it is the duty of postmasters to deliver them to the persons to whom they are addressed. U. S. v. Pond, 2 Curt.

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265. Fed. Cas. No. 16,067 ; Buck v. Chapin, 99 Mass. 594 ; Morgan v. Richardson, 13 Allen, 410 ; Taylor v. Insurance Co., 9 How. 390.

However, it is not pretended in this case that the checks were destroyed or proved worthless, or that the Capital National Bank either withdrew the remittances or countermanded their delivery.

We think that the courts below well held that, under the facts of this case, the mailing of these checks and remittances was a delivery to the Chemical National Bank, whose property therein was not destroyed or impaired by a subsequent act of bankruptcy.

It is finally urged that, however it may be as to the remittances received through the mail on January 23, 1893, yet that the payment or remittance of \$833.64, received on January 24th, was a payment made after the declaration of insolvency, and must therefore be accounted for by the defendant bank.

It is claimed that there was no evidence that this remittance came by mail, and that all there is in the case is the admission by the defendant bank of its receipt of that sum on January 24, 1893.

But it is to be observed that no mention is made in the bill of this particular item, though the other litigated items are specified, and to the latter only was the proof directed. In the absence of evidence as to any other method of transmission, and in view of the fact that all the other payments were made by mail, it would seem to be a reasonable inference that such was the case of this remittance. The record discloses that the cashier of the Chemical National Bank testified in the case. He had furnished the complainant with a statement of the accounts between the banks from January 3, 1893, to January 24, 1893, including this particular item, but he was not cross-examined as to this item. Had he been so examined, a more particular statement in respect to it would have been, no doubt, elicited. It was apparently assumed that the history of this payment did not differ from that of the others, and the effort

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now made in respect to it seems to be in the nature of an afterthought, too late to permit an explanation.

Upon the whole case, we are of the opinion that the decree of the court of appeals was correct, and its decree is accordingly affirmed.

MR. JUSTICE WHITE, MR. JUSTICE PECKHAM, and MR. JUSTICE MCKENNA dissented.

NOTE.

Banks—Insolvency—Preferences—Intention.—In *Stone v. Jenison* (Mich.), 8 Am. & Eng. Corp. Cas., N. S., 750, MOORE, J., delivering the opinion of the court, said: "In the case of *Hayes v. Beardsley*, 136 N. Y. 299, 32 N. E. 855, which was a case of payment of certificates of deposit after the bank became insolvent, and after the cashier had known for months that it was insolvent, this language is used: 'There was no satisfactory evidence that these payments were made by the bank to prevent the application of its assets in the manner prescribed in the national banking act, or with a view to a preference of the defendant over the other creditors of the bank. * * * There does not appear from the facts found to be any better ground for claiming that these payments made to the defendant were void than there is for making the same claim in reference to the numerous payments made in the regular course of business by this bank to its customers during many months prior to the closing of its doors. In order to uphold a recovery in an action like this, there should be some satisfactory evidence that the cashier or other officer actually paid the money of the bank in contemplation of insolvency for the purpose of giving a preference to the payee, and with a view to prevent the application of the assets of the bank to the creditors generally.' The provisions of the act construed in this decision are almost identical with the provisions of the Michigan banking act, and we think the construction a reasonable one. If the receiver can maintain this proceeding, I can see no good reason why he may not sue and recover from each of the depositors who drew their money after the bank became embarrassed. Such a construction does not commend itself to one's sense of justice. See *Curtis v. Leavitt*, 15 N. Y. 198; *Fidgeon v. Sharpe*, 5 Taunt. 545; *Tiffany v. Lucas*, 15 Wall. 410; *Jones v. Howland*, 8 Metc. (Mass.) 377; *Utley v. Smith*, 24 Conn. 310; *Haas v. Whittier*, 97 Cal. 411, 32 Pac. 449."

Schmelling v. State

SCHELLING

v.

STATE *et al.**(Supreme Court of Nebraska, Feb. 9, 1899.)*

Trial without Jury—Evidence.—That improper evidence was admitted during the trial of a cause to a court without a jury is not alone sufficient reason for the reversal of the judgment.

Same—Same—Presumptions.—If the trial was to the court without a jury, the presumption will prevail on appeal that the court considered none but the proper evidence.

Same—Same—Leading Questions.—If no abuse of discretion appears, the permission of leading questions to a witness is not cause for reversal of the judgment.

General Deposits—Insolvency—Priority.*—The owner of a sum of money on a general deposit in a bank at the time of its failure is not entitled to a preferred claim against the assets in the hands of its receiver.

Conflicting Evidence—Review.—A finding upon conflicting evidence will not be disturbed on appeal if there is sufficient evidence for its support.

(Syllabus by the Court.)

ERROR by depositor to Nuckolls county district court.
Affirmed.

Stubbs & Mauck, for plaintiff in error.

S. A. Scarle, for defendants in error.

HARRISON, C. J. The Bank of Superior failed in business on or about February 11, 1895; and in the regular course of procedure under the law of the state then in force relative to banks, and the adjustment of the affairs of insolvent ones, a receiver was appointed for the bank we have named, and entered upon the discharge of the duties which by law were devolved upon him. The plaintiff in error presented an application to the receiver by petition in the district court of Nuckolls county, by which he demanded that for the sum of \$822.77 he be adjudged

Case Stated.

*See note, ante 95 *et seq.*

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to have a preferred claim against the assets of the bank in the hands of the receiver, and that it be ordered paid to him. Issues were joined, and, after a trial thereof to the court, the prayer of the application was denied.

The application of plaintiff in error for a preferred claim was predicated upon the assertion that he had placed in the bank the amount he claims to be his due, not generally, but to be held to await the arrival of the time for the performance of a contract for the sale and purchase of some real estate in which he was the named purchaser (this contract was then put in care of the bank), at which time it was to be paid to the vendor of the land. The contention was and is that the money was not a general deposit, but a special and specific one, and, as such, entitled to preference in payment from the assets of the bank. The deposition of the party who at the time the bank failed was its cashier was taken, also of the one who was then its assistant cashier. This was done in Chicago, to which city these persons had removed subsequent to the closing of the bank. The plaintiff in error was not present in person or by counsel at the taking of the depositions, and for him there were filed objections to a number of the interrogatories propounded. This was done after the depositions were received and filed in the court of trial, and prior to the hearing. The objections were overruled, and the depositions read and received in evidence, and the admission of this testimony is of the errors assigned and presented. That evidence admitted during a trial to the court without a jury was incompetent, irrelevant, or im- Trial without Jury—Evidence. material will not alone work a reversal of the judgment. *McKee v. Bainter*, 52 Neb. 604, 72 N. W. 1044; *King v. Murphy*, 49 Neb. 670, 68 N. W. 1029; *Viergutz v. Aultman, Miller & Co.*, 46 Neb. 141, 64 N. W. 693. It will be presumed that the trial court considered none other than Same—Same—Presumptions. the proper evidence. *McKee v. Bainter*, *supra*; *Smith v. Perry*, 52 Neb. 738, 73 N. W. 282.

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Moreover, a considerable portion of the testimony to which objection was interposed was competent and material.

Of the objection that each of a majority of the questions asked at the taking of the depositions was leading, it must be said that they were open to the complaint; and, had the trial court's ruling been the reverse of what it was, we should have been entirely satisfied of its propriety and correctness, but the rule is: "The extent to which leading questions may be allowed rests in the discretion of the trial court, and the rulings in that respect will not, in the absence of an abuse of discretion, be disturbed by this court." *Iron Co. v. Burg*, 47 Neb. 21, 66 N. W. 8; *Railroad Co. v. Hedge*, 44 Neb. 448, 62 N. W. 887; *Bank v. Leonard*, 40 Neb. 676, 59 N. W. 107; *Insurance Co. v. Gotthelf*, 35 Neb. 351, 53 N. W. 137. We do not feel warranted in saying that there was any abuse of discretion in the allowance of these leading questions; hence must disregard this argument.

The only further assignment of error is that the finding and judgment were not supported by the evidence. The evidence on the main point involved in the litigation was conflicting, and there were facts and circumstances as well as direct testimony which would have warranted a contrary conclusion to the one reached by the trial court, but the one at which the court arrived had sufficient of the evidence to sustain it, and will not be disturbed.

The decision of the case hinged upon the question of whether the money of the plaintiff in error was in the bank as a special deposit, a special or trust fund, and entitled to a preference in payment from the assets of the bank, or was it an ordinary or a general deposit, and the claim not entitled to be preferred. The trial court determined it was the latter, and there was sufficient evidence to sustain the finding. The judgment was proper, and must be affirmed. Affirmed.

Same - Same -
Leading Questions.

Conflicting Evi-
dence - Review.

General Deposits -
Insolvency -
Priority.

Burrell v. Bennett

BURRELL *et al.*

v.

BENNETT.

(Supreme Court of Washington, March 4, 1899.)

Insolvency—Preferences.*—When a bank was in fact insolvent, and its officers and the plaintiffs were chargeable with notice of its condition, the bank, in order to gain an extension of time, pledged a note and mortgage as additional security for a debt due plaintiffs. *Held*, that such transaction was an unlawful preference.

APPEAL by plaintiffs from Whatcom county superior court. *Affirmed*.

Bloomfield & Evans, for appellants.

Black & Leaming, for respondent.

REAVIS, J. The Puget Sound Loan, Trust & Banking Company was in July, 1893, under control of a receiver appointed by order of the superior court, and so remained until November, 1894. On that date its officers, under the terms of an agreement between the bank and its creditors, and by permission of the superior court, resumed business. One of the conditions of its resumption of business was that money should be borrowed from the Bank of California and other parties, including the appellants here, for the purpose of carrying on the business, and to be used in payment of the creditors of the bank. Under the arrangement so made, the banking company borrowed \$5,000 from the appellants, and, as evidence of the indebtedness, on November 24, 1894, delivered to appellants two certificates of deposit, of \$2,500 each, payable, respectively, six and nine months after date, and also delivered to appellants certain collateral securi-

*See notes at end of case.

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ties, consisting of notes, stock, and mortgages, as security for the payment of the certificates of deposit. In May, 1895, when the first certificate of deposit was due, the banking company asked for an extension of time. After some negotiations between the banking company and the appellants, the payment of \$600 was made to appellants, and the note and mortgage here in controversy were delivered to appellants as additional security, with a written power of sale thereof. The banking company continued to carry on business until November, 1895, when it was adjudged insolvent, and a receiver appointed to take charge of its affairs. The certificates of deposit not having been paid, appellants commenced this action to foreclose and sell their security so pledged. The respondent receiver appeared, and made two defenses to the suit—First, that the pledge of the note and mortgage as collateral security was made without authority of the trustees of the banking company; that there was no formal resolution of the board authorizing it; second, that the company was at the time in fact insolvent; and that the delivery of the collateral security to appellants with such knowledge was an unlawful preference of appellants over the general creditors of the banking company.

1. The delivery of the collateral security to appellants by the officers of the banking company was, we think, authorized; and the only question presented for determination here is whether the delivery of the collateral security in suit to appellants was at the time an unlawful preference by the insolvent corporation of appellants, and an injury to the other general creditors.

2. The sixteenth finding of fact made by the superior court is as follows: "This court further finds as a fact that the officers of said bank acted in good faith in pledging said collaterals on said 25th day of May, 1895, believing the same to be to the best interest of said bank, and that said officers did not at said time realize that said bank was insolvent, and that plaintiff received said pledge, and granted said extension of

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time, without knowing that said bank was insolvent ; but this court further finds as a fact that the officers of said bank and plaintiffs should have known from the facts, at that time before them, that said bank was either insolvent or in imminent danger of insolvency ; and the officers of said bank also knew that unless said extension of time could be procured from plaintiffs, and also from other creditors whose claims against said bank matured on or about said day, that said bank could not continue business." The finding is challenged by counsel for appellants as not sustained by the evidence, and as immaterial. That, at the date mentioned in the finding, the bank was insolvent, was also found by the superior court, and is abundantly sustained by the evidence ; and some criticism may be properly made of the expression "that said officers of the bank did not at said time realize that said bank was insolvent," because we think it entirely improbable that intelligent banking officers, in the management of its affairs at that time, did not know the bank was in fact insolvent. However, that portion of the sixteenth finding, "But this court further found that the officers of the said bank and plaintiffs [appellants] should have known from the facts at the time before them that said bank was either insolvent or in imminent danger of insolvency," is sustained, we think, by the evidence. The appellants were not strangers to the insolvent banking company. They were familiar with the fact that it had been insolvent, and its affairs under the control of the receivership until November, 1894, and that it reopened under an agreement with its creditors, and was conducting its business in accordance with the terms of its reopening. Appellants had requested the payment of the certificate of deposit when it fell due. Ten shares of stock in another corporation, held by appellants as collateral security, had become valueless. The defendant banking company asked for an extension of time, and for such extension the note and mortgage in suit here were given as additional security. The amount of appellants'

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certificate of deposit was reduced by cash payment and additional security given for the remainder. The officers of the banking company knew that, unless the extension of time was secured from the plaintiffs and the other creditors whose claims against the bank matured about that time, the bank could not continue business. Counsel for appellants urge with much earnestness that the facts shown in this case do not fall within the former decisions of this court upon unlawful preferences by insolvent corporations. Under the conditions existing at the time the additional collateral security was delivered to appellants, the banking corporation being in fact insolvent, the relations of the appellants and the banking officers and their knowledge of its affairs being such as to advise them of its condition, the pledge of the collateral security was in fact a preference of appellants by an insolvent corporation, within the rule announced by this court. *Conover v. Hull*, 10 Wash. 673, 39 Pac. 166; *Cook v. Moody*, 18 Wash. 114, 50 Pac. 1020.

The frequent and exhaustive consideration of what is termed the "trust-fund theory" by this court in its construction of the statutes and policy of the state would make it unprofitable to review the numerous and very respectable authorities presented here for our consideration by counsel for appellants, as the court is satisfied with its adjudications heretofore rendered on this subject. The judgment of the superior court is affirmed.

GORDON, C. J., and DUNBAR and ANDERS, JJ.,
concur.

NOTES.

Banks—Insolvency.—See generally, 3 Am. & Eng. Enc. of Law (2nd Ed.), 847 *et seq.*

What Constitutes Insolvency.—A bank is insolvent when it is unable to meet its liabilities as they become due in the ordinary course of business; and a bank is not insolvent, in the sense of the law as long as it meets its liabilities as they become due, and there is a reasonable expectation on the part of the officers familiar with its

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business affairs of continuing to do so. *Minton v. Stahlman* (Tenn. 1896) 3 Am. & Eng. Corp. Cas., N. S., note 507, 34 S. W. Rep. 222.

"A bank is not in contemplation of insolvency until the fact becomes reasonably apparent to its officers that it will be presently unable to meet its obligations, and will be obliged to suspend its ordinary operations." *Armstrong v. Chemical Nat. Bank*, 41 Fed. Rep. 234; *Roberts v. Hill*, 24 Fed. Rep. 571.

National Banks—Insolvency—Preferences.—Under the national bank act, to render a transfer of assets by an insolvent national bank invalid, it must be made either for the purpose of preventing the application of the assets in accordance with the requirements of the statute, or for the purpose of preferring one creditor to another. *National Security Bank v. Butler*, 129 U. S. 223. See also *McDonald v. Chemical Nat. Bank* (U. S.), *ante* and *note*.

MORRIS

v.

EUFULA NAT. BANK.

(*Supreme Court of Alabama, Feb. 2, 1899.*)

Collecting Bank Receiving Check for Draft—Dishonor—Liability.*—A bank received a draft from the drawer for collection; and, upon presenting it for payment, received from the drawee his check for the amount of the draft, drawn on another bank of the same town in which it was located. *Held*, that, as between itself and the drawer of the check, the bank had until the close of banking hours on the next secular day after receiving the check to present it to the drawee bank for payment,—the time allowed by commercial law, as the bank in presenting the check was not the agent of its drawer.

Pleading.—It is not allowable to join a count in case with one in assumpsit.

APPEAL by plaintiff from Barbour county circuit court. *Affirmed*.

The complaint read as follows: "The plaintiff claims of the defendant five hundred dollars as damages for that whereas, to wit, on March 30, 1891, the defendant had in its possession for collection a certain draft or bill of exchange drawn on plaintiff by the

*See note at end of case.

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Mound City Distilling Company, and accepted by him, for the sum of four hundred and seventy and 22-100 dollars, and which said draft or bill of exchange was due and payable on said March 30, 1891; and that on said day the said defendant presented said draft or bill of exchange to the plaintiff in the city of Eufaula, Alabama, about 10 o'clock in the forenoon of said day, for payment, and that said plaintiff then and there gave to said defendant a check on the John McNab Bank, a bank then doing a banking business in the city of Eufaula, Alabama, for said sum of four hundred and seventy and 22-100 dollars, the amount due on said draft or bill of exchange. And plaintiff avers that he drew said check for said sum on the John McNab Bank, and delivered the same to the defendant in the city of Eufaula, Alabama, about 10 o'clock in the forenoon of said March 30, 1891, and that at the time said check was so drawn by plaintiff and delivered by him to the defendant, and during the remainder of said day, March 30, 1891, the said John McNab Bank kept open its banking house and carried on its banking business in the usual way, and paid all checks which were drawn on or against it during said day. And plaintiff further avers that at the time he drew said check and delivered it to the defendant as aforesaid he had on deposit to his credit in the said John McNab Bank, and subject to his check, the sum of two thousand dollars, and that the said defendant, by the exercise of reasonable diligence, could have presented said check to the said John McNab Bank during banking hours on said March 30, 1891; and that if defendant had so presented said check on said March 30, 1891, the same would have been paid in full by the said John McNab Bank, but said defendant, notwithstanding its contract in the premises, and in disregard of its duty arising out of its contract with plaintiff, failed to present said check to the said John McNab Bank on said March 30, 1891. And plaintiff further avers that after said March 30, 1891, and on March 31, 1891, the said John McNab Bank suspended payment, and failed, and never after its said

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failure carried on any business, and by reason of the premises the said plaintiff was compelled by said defendant, on March 31, 1891, to take up said check so given by him to it as aforesaid, and pay said defendant in money the said sum of four hundred and seventy and 22-100 dollars on March 31, 1891, and by reason thereof plaintiff was damaged as aforesaid ; wherefore he brings this suit."

G. L. Comer, for appellant.

S. H. Dent, Jr., for appellee.

PER CURIAM. A draft had been drawn by the Mound City Distilling Company on the plaintiff, Morris, and duly accepted by him. It was due on March 30, 1891, and was held by the defendant, the Eufaula National Bank, for collection. The latter made due presentment of it to the drawee and acceptor thereof for payment on March 30th, and received from him a bank check drawn by him for the amount due on the accepted draft on the John McNab Bank, another banking institution then doing business at Eufaula, Ala., where the payee thereof was located. The check dated March 30th was payable to the Eufaula National Bank, and was delivered about 10 o'clock in the forenoon. The John McNab Bank continued to pay checks drawn on it and presented during the remainder of the day of March 30th, and, having then closed its doors, did not thereafter resume business operations. The plaintiff had funds on deposit with the drawee sufficient to meet the check, which would have been paid if presented within banking hours on the day it was delivered to defendant. On March 31st, the John McNab Bank being then closed, the plaintiff took up his check, and paid defendant the amount called for therein, \$470.22. The first amended count, from which the above facts appear, states that the plaintiff "was compelled" by the defendant to take up the check, and we therefore assume that it was taken up and the amount paid on the insistence of the defendant that it should be done. The plaintiff afterwards brought his action against the

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defendant, wherein he claims damages on account of the failure of the defendant to present the check on March 30th. A check is payable on presentation and demand. To charge the drawer, the holder is required to present it within a reasonable time, and after the lapse of a reasonable time from its delivery by the drawer the holder retains it at his peril. *Savings Co. v. Weakley*, 103 Ala. 458, 15 South. 854; *Watt v. Gans* (Ala.) 21 South. 1011. As between the holder and drawer of the check, however, presentment may be made at any time, and delay in presentment does not discharge the liability of the drawer unless loss to him has resulted. *Carroll v. Sweet*, 128 N. Y. 19, 27 N. E. 763; 2 Daniel, Neg. Inst. § 1587; *Savings Co. v. Weakley*, *supra*. Without questioning these general principles, it was held on the former appeal in this case (106 Ala. 383, 18 South. 11) that the amended complaint showed a cause of action. The conclusion of the court was reached upon a distinction, therein pointed out, as being established by the authorities cited in the opinion. In illustrating the proposition announced by him (2 Morse, Banks, § 421), quoted in our former opinion, that learned author was not as lucid as he usually is, but the proposition itself is clear. He thus states the same doctrine in section 240: "But when a check is taken, instead of money, by one acting for others, a delay of presentment for a day, or for any time beyond that within which, with proper and reasonable diligence, it can be presented, is at the peril of the party retaining the check and postponing presentment, as between him and the persons in interest whom he represents. And where loss occurs because such a check is not presented on the day of its reception, the agent is liable." The same doctrine is thus stated by Mr. Daniel: "The allowance of a day to present the check does not extend to an agent who receives one for a debt of his principal. He must present it instantaneously." 2 Daniel Neg. Inst. § 1590. The authority cited by each of these text writers is *Smith v. Miller*, 43 N. Y. 171; Mr. Daniel

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citing, in addition, *Farwell v. Curtis*, 7 Biss. 165, Fed. Cas. No. 4,690, and *First Nat. Bank of Meadville v. Fourth Nat. Bank of New York*, 16 Hun, 332. As the case of *Smith v. Miller*, 43 N. Y. 171, 52 N. Y. 546, is cited as sustaining the conclusion of the court in this case on the former appeal, it is proper to make a fuller statement of it than we would otherwise feel called on to do. The plaintiffs in that case brought an action to recover the unpaid balance of the price of a bill of goods sold by the plaintiffs to the defendants. The defendants set up a defense of payment by a draft for \$2,968.69 drawn by them on James K. Place & Co., of New York, to the order of plaintiffs, who resided and did business in New York, the defendants residing at Buffalo. The plaintiffs received the draft by mail on the morning of November 19th, and immediately indorsed it, and at about half past 1 in the afternoon of the same day presented it for payment at the counting house of James K. Place & Co., the drawees, who were merchants in New York in good standing. In payment of the draft James K. Place & Co. gave their check on the Manufacturers' National Bank of New York City, to the order of plaintiffs, for the full amount. At the time plaintiffs received the check of James K. Place & Co. the latter had funds in the Manufacturers' Bank to meet the check, which would have been paid had it been presented on that day. The check was deposited during the same afternoon in the Citizens' Bank for collection, and was not presented for payment at the Manufacturers' National Bank till 12 o'clock the next day, on the morning of which James K. Place & Co. had failed, and on that account payment of the check was refused. The action therefore was between parties to the original draft, and was not between the parties to the check which James K. Place & Co. had given to plaintiffs. The court, in its opinion, says: "When a check is taken, instead of money, by one acting for others, as was done by the plaintiffs, a delay of presentment for a day, or for any time beyond that within which, with proper and reasonable diligence, it can be presented, is at the

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peril of the party thus retaining the check and postponing presentment, as between him and the persons in interest whom he represents." 43 N. Y. 176. In *First Nat. Bank of Meadville v. Fourth Nat. Bank of New York*, 16 Hun, 332, 77 N. Y. 320, it appeared that the Meadville Bank had forwarded to the Fourth National Bank a sight draft drawn by another bank in Meadville on certain bankers in New York. On receipt of the draft, the Fourth National Bank presented it to the drawees for payment, who gave their check on another New York bank for the amount, and the draft was delivered to them. The Fourth National Bank did not present this check for payment on that day, but sent it through a clearing house, and it was presented the next day for payment, but payment was refused, the drawers of the check having failed on that day. The Fourth National Bank thereupon returned the check to the drawers, received back the draft, made formal demand of payment and caused the draft to be protested for nonpayment, and on the next day due notice of protest was served by mail upon plaintiffs and upon the drawer of the draft. The action was brought by the Meadville Bank against the Fourth National Bank to recover damages resulting from alleged negligence on the part of defendant in the performance of its duty, as agent for plaintiff. It was held that it was the duty of defendant to have presented the check for payment as soon as, with reasonable diligence, it could, and for any damages arising from the delay in presentation it was liable. This case, it will be observed, was between the drawer or owner of the draft and its agent for collecting the same. The question presented in *Farwell v. Curtis*, 7 Biss. 165, Fed. Cas. No. 4,690, so far as it bears on the point under discussion, was of the same general nature as that in *Smith v. Miller*, which was there cited and approved. If the Mound City Distilling Company were suing the Eufaula National Bank for accepting the check of the drawee of the draft, and thereby causing loss to it, the cases referred to would be in point, but that is not the case presented by

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the record before us. And that the court in *Smith v. Miller* did not intend that its language or decision should be construed to apply to the relative rights of the parties to the check itself drawn by James K. Place & Co. is apparent from its language just preceding that above quoted, the court saying: "But a check is payable instantly, and, as between the drawer and drawee, the latter has, in analogy to the rules applicable to inland bills of exchange, until the day after the receipt of a check to present it for payment, when drawn on a bank in the same place where given and received. But," continues the court, "the duty of the plaintiffs is not determined by that rule of commercial law. That rule has respect only to the contract and liability of parties to the instrument." And we may say further that in *Railroad Co. v. Collins*, 3 Lans. 29, 57 N. Y. 641, the question decided in *Smith v. Miller* is clearly pointed out. There the defendant had given the plaintiff a check on a local bank for the amount of freight bills on May 4th. The bank on which it was drawn failed on the 5th, and the check was not presented or paid. The action was for the amount of the freight bill, for which the check had been given. The court held that there was no laches in not presenting the check before the bank closed, as the plaintiff had the whole of the next day after receiving it (*i. e.* of the 5th) in which to present it; and, referring to *Smith v. Miller*, distinguished it in the particular above pointed out, namely, that that case was not disposed of upon the rules of law regulating the rights and duties, respectively, of the drawer and drawee of a check, but upon the rules applicable to one who takes a check for collection, acting for one not a party to it. The distinction, therefore, to be drawn from the foregoing authorities is this: That, as between the drawer or owner of the draft on the one hand and the party charged with the duty of collecting it on the other hand, the question of their relative rights is to be determined by the rules of law applicable to principal and agent; and that, as between the drawer and the payee of a check

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given under the circumstances and for the purpose shown in this case, the question of their respective rights and liabilities is to be ascertained and fixed by the principles of the commercial law. The defendant here, in collecting the draft, was the agent of the drawer thereof, and in no proper sense can it be said to have been the agent of the plaintiff. 1 Morse, Banks, § 214; *Dodge v. Trust Co.*, 93 U. S. 385; *Anderson v. Gill*, 79 Md. 312, 29 Atl. 527. There are numerous cases, besides those already adverted to, some of which are referred to hereafter, where the action was upon the check itself, or upon the original indebtedness, and the defense was interposed of payment, by reason of laches in the presentation of the check for payment, which resulted in a loss or damage to the drawer; and such laches and consequent damage we have held may be shown under a plea of payment. *Watt v. Gans* (Ala.) 21 South. 1011. Manifestly, the drawer's case is not made any stronger by the mere fact that he is plaintiff than it would, under the same circumstances, be if he were defendant, and pleading that he was discharged by the payee's or holder's delay in presenting the check. It would, indeed, be an anomaly to decide that the defendant had a reasonable time within which to present the check for payment, in order to charge the drawer, and, under the same state of facts, to hold that the defendant was guilty of negligence in not presenting it before the expiration of such reasonable time.

Under the facts stated in the count of the complaint under consideration, the only obligation, so far as concerned the plaintiff, which rested upon the defendant, was to use due diligence to make presentment and demand of payment of the check within the reasonable time allowed by the rules of the commercial law, and, upon its being dishonored, to give due notice to the drawer. 1 Morse, Banks, § 218. What, then, is the reasonable time which the defendant had within which to discharge the obligation, under the facts of this case? We consider it thoroughly settled that the reasonable

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time allowed the holder for presenting a check, when he receives it in the same place where the bank on which it is drawn is located, is till the close of banking hours on the next secular day; and if, in the meantime, the bank fails, the loss will fall on the drawer. Daniel, Neg. Inst. § 1590; 1 Morse, Banks, §§ 240, 421; Rand. Com. Paper, § 1103; Bank v. Spicer, 6 Wend. 443; Wear v. Lee, 87 Mo. 358; Bickford v. Bank, 42 Ill. 238; Simpson v. Insurance Co., 44 Cal. 139; Loux v. Fox, 171 Pa. St. 68, 33 Atl. 190; Anderson v. Gill, 79 Md. 312, 29 Atl. 527; Holmes v. Roe, 62 Mich. 199, 28 N. W. 864; Smith v. Miller, 43 N. Y. 171; O'Brien v. Smith, 1 Black, 99. We recognized and approved this rule in Savings Co. v. Weakley, *supra*. In Bank v. Nelson, 105 Ala. 180, 16 South. 707, this court held that checks were included in the word "bills" as used in section 1761 of the Code of this state, relating to instruments governed by the commercial law. In that case, JUDGE HARALSON, speaking for the court, says: "We fail to see why checks, as well as other commercial instruments, do not require the protection of the statute. They are as well known, and from the necessities of the case enter as largely into the commercial transactions of the country, as other species of commercial instruments; and, after all we have said and attempted on the subject of negotiable instruments for these many years, to relegate them to take their chances as commercial bastards, and make their own way in the commercial world, deprived of the protection which is accorded to other negotiable instruments, it seems would be against reason, authority, and the interest of the country." Nothing is shown by the count we have discussed which calls for any modification of the well-settled rule above announced. The acceptance of the check by the defendant was only a payment of the draft *sub modo*, and could become operative as a payment in fact only when the check was paid (Smith v. Miller, *supra*); and, the drawee bank being closed on March 31st, the defendant could on that day have tendered back to the drawer his check,

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and made formal demand for the payment of the accepted draft (First Nat. Bank of Meadville *v.* Fourth Nat. Bank of New York, 77 N. Y. 320). Whether, therefore, his payment on March 31st be treated as a payment of his check or of the acceptance, the result is the same as to him, as he was, by reason of having accepted the draft, liable thereon as the principal debtor. 3 Am. & Eng. Enc. Law (2d Ed.) 470; Ticknor *v.* Bank, 3 Ala. 135. His liability was not discharged, and under the views we have expressed the defendant was not liable to him in damages. It follows that the demurrer to the first count should have been sustained, and that the former opinion in this case (106 Ala. 383, 18 South. 11) must be overruled.

After the case returned to the circuit court, the plaintiff was allowed to amend his complaint by filing an additional count, which averred substantially the

Pleading. same facts that appear in the original com-

plaint, except that he averred that at the time he delivered his check to defendant the latter "contracted with plaintiff to present the same within a reasonable time to said John McNab Bank for payment," and "that defendant violated its contract with plaintiff in that it did not present said check for payment to the John McNab Bank within a reasonable time on said March 30, 1891." Without stopping to determine whether the meaning of the averments is that a contract was made whereby the defendant agreed to present the check on March 30th, the day of its receipt, we are satisfied the court's ruling is free from error on this branch of a case. As we construe the original complaint, it counted on the want of due diligence or negligence of the defendant in presenting the check, and was therefore in case. The new count claiming damages by reason of the alleged violation of the contract therein set out was in assumpsit. But it is not allowable to join a count in case with one in assumpsit. By the introduction of the additional count the complaint was made to contain a misjoinder of counts, and the defect was properly taken advantage of

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by the demurrer to the entire complaint as amended. *Wilkinson v. Moseley*, 30 Ala. 562. The plaintiff having declined to plead further, judgment was rendered against him, and the judgment of the circuit court is affirmed.

The foregoing opinion was prepared by former CHIEF JUSTICE BRICKELL, and is adopted by the court.

NOTE.

Checks on Local Banks—Presentment.—As a general rule, the holder of a check on a local bank has until the close of banking hours on the next secular day after the check is received to present it for payment. *Industrial Trust, etc., Co. v. Weakley*, 103 Ala. 458; *Bickford v. Chicago First Nat. Bank*, 42 Ill. 238, 89 Am. Dec. 436; *Cawein v. Browinski*, 6 Bush (Ky.) 754; *Veazie Bank v. Winn*, 40 Me. 60; *Taylor v. Wilson*, 11 Met. (Mass.) 44; *Hamilton v. Winona Salt, etc., Co.*, 95 Mich. 436; *Wear v. Lee*, 87 Mo. 358; *Merritt v. Todd*, 23 N. Y. 41, 80 Am. Dec. 243; *Kelty v. Erie Second Nat. Bank*, 52 Barb. (N. Y.) 334; *Charlotte First Nat. Bank v. Alexander*, 84 N. Car. 30; *Merchants' Nat. Bank v. Proctor*, 1 Cinc. Super. Ct. Rep. (Ohio) 1; *Doherty v. Watson* 29 W. N. C. (Pa.) 32; *Kirkpatrick v. Puryear*, 93 Tenn. 409; *Gregg v. Beane*, 69 Vt. 22, 37 Atl. 248, Bkg. L. J.

NEW FARMERS' BANK'S TRUSTEE

v.

COCKRELL.

(*Court of Appeals of Kentucky, May 13, 1899.*)

Deposits—Trust Funds—Assignment for Creditors—Priority.*—Where deposits are received by a bank with knowledge that it is a trust fund, under an agreement to repay it with interest, and such fund is used by the bank in its business, and the bank subsequently makes a general assignment for the benefit of its creditors, the *cestuis que trustent* are not entitled to have the deposits refunded out of the assets in the hands of the bank's assignee, to the exclusion of general creditors, unless it appears that the trust fund was contained in the assets of the bank which came to the hands of the assignee; and the fact that the trust fund was carried upon the books of the bank to the credit of the depositor as trustee is immaterial in this connection.

*See notes at end of case.

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APPEAL by defendant from Montgomery county circuit court. *Reversed.*

Stone & Sudduth, John C. Miller, and C. P. Chenaunt, for appellant.

Tyler & Apperson, for appellee.

DU RELLE, J. William Mitchell filed suit in the Montgomery circuit court against the appellant, alleging that he had been appointed, by order of court in an action in said court by Anderson's administrator against Annie Dooley and others, as trustee and receiver for the Hocker children; that a large fund had come into his hands, of which he had deposited two sums, aggregating nearly \$2,300, in the New Farmers' Bank, under an agreement that the bank should repay him, as such trustee and receiver, the amounts deposited, with interest; that said funds were deposited by him in his trust capacity, and were trust funds in the hand of the bank, and that he was entitled to be paid the amount of them in full before the general creditors of the bank; that the bank had made a general deed of assignment for the benefit of its creditors, and, the trustee thereby appointed having failed to qualify, the appellant was appointed by the court, and had qualified and acted as trustee; that he, Mitchell, was nominally acting as receiver and trustee of the Hocker children, but the bank was the real receiver and trustee. A demurrer having been sustained to the petition, an amended petition was filed, alleging that, at the time of Mitchell's "appointment as such receiver, said bank was desirous of obtaining the funds which had thus come to his hands, and was willing to pay the aforesaid interest thereon to obtain same as a deposit, and at its instance and for its benefit plaintiff was induced and authorized to seek said appointment as receiver, and to qualify as such; plaintiff at that time being cashier or president of the said bank. Plaintiff states that from the time that said funds were deposited in said bank, as aforesaid until its assignment to R. B. Young, who failed to qualify, they were recognized by

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said bank and its officers as trust funds, subject to the control of this court, and said bank as the real receiver and plaintiff as nominal receiver only; that said funds were, from the time of their deposit in said bank as aforesaid to its assignment, carried on its books to his respective accounts as trustee and receiver aforesaid, separate and distinct from all other accounts, and so remain today." Mitchell having died, and appellee having been appointed in his place as receiver of the fund, the latter was substituted as plaintiff. A demurrer to the petition as amended was overruled, and, appellant standing by his demurrer, it was adjudged that appellee should recover the amounts claimed, and that they were trust funds and preferred claims against the assets of the bank.

It is not necessary to consider whether there was inconsistent pleading in the petition; nor, in the view we take of the case, is it essential to decide whether, under the averments of the petition as amended, the bank was the real trustee of the fund, though it would seem that the averments as to the deposit, taken in connection with the agreement to pay interest, would make it a loan by Mitchell to the bank, the money being placed to his credit as trustee, and showing that the bank was indebted in that sum to the trust fund. *Mills v. Swearingen*, 67 Tex. 270, 3 S. W. 268. There is no averment indicating that the loan was in violation of the trust, and so known to be by the bank. On the contrary, the presumption from the averments is that Mitchell was authorized to make an investment or loan of the fund, so as to produce an income for his *cestuis que trustent*, and would have been derelict had he not done so. But, assuming that, by virtue of the transaction stated in the petition as amended, the bank did become trustee, we shall consider the question whether this entitled the beneficial owners of the fund to subject the bank's assets to the payment of their claim, to the exclusion of the other creditors. On behalf of appellee it is urged that it is unnecessary to trace the trust fund into the hands of the assignee, it being

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admitted by the demurrer that the bank received it with notice of the trust; that it thereby became in fact the trustee, and its assignee occupied no better position with reference to the fund than the bank did; that, having mingled this fund with its other money and used it in its regular business, the assets of the bank were thereby increased, and the *cestuis que trustent* were entitled to have their money refunded out of the assets in the hands of the assignee, to the exclusion of the general creditors. In support of this contention counsel relies upon Beach, Trusts, § 689, where it is said: "In a recent case [Banks v. Rice (Colo. App.) 45 Pac. 515] it was held that where one mingles money of another with his own, and then expends the fund thus created in his own business for different purposes, in some of which the money cannot be traced, the law will presume such other's money—it being impossible to determine what proportion of it was used for each purpose—was all used for purposes in which it can be traced, and, when that purpose was the purchase of new stock for the business, the fact that the identity of the original stock was changed by sale and replenishment is immaterial, so long as the fund remains in the business." Beach, Trusts, § 700, and a number of other cases, are cited in support of this view. It is to be observed that in a number of these cases the trust fund was lent in violation of the trust, and without authority to make the loan, and with knowledge of that fact on the part of the borrower.

Especial reliance is placed upon the case of Myers v. Board, 51 Kan. 87, 32 Pac. 658, a case almost exactly on all-fours with the case at bar, in which the treasurer of the school funds deposited them in a bank of which he was manager. The fund had been mingled with the funds of the bank, and used in paying its creditors. The bank assigned, and neither the money nor any specific property into which it had been converted could be clearly traced in the hands of the assignee. The Kansas court, after quoting 2 Story, Eq. Jur. § 1259, said: "The modern doctrine of

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equity, and the one more in consonance with justice, is that the confusion of trust property so wrongfully converted does not destroy the equity entirely, but that when the funds are traced into the assets of the unfaithful trustee, or one who has knowledge of the character of the fund, they become a charge upon the entire assets with which the are mingled. * * *

It would seem to be immaterial whether the property with which the trust funds were mingled was moneys, or whether it was bills, notes, securities, lands, or other assets. As the estate was augmented by the conversion of the trust funds, no reason is seen, under the equitable principles which have been mentioned, why they should not become a charge upon the entire estate." Before proceeding to consider whether this doctrine is law in Kentucky, it may be said that it is conceded by appellant that, if the money could be traced, it, or property in which it had been invested, could be subjected to the payment of appellee's claim. It is conceded by appellee that the actual money cannot be traced, but it is contended that the fund is traceable by reason of the fact that it was carried upon the books of the bank to the credit of Mitchell as trustee. In this there seems to be some confusion. From the allegations of the petition we must conclude that the money (as in the Kansas case) was used by the bank in its regular business, lent to its customers, and used in paying its debts. The fact that the account stands upon the bank's books in favor of Mitchell as trustee does not in any way identify the fund which that account shows that the bank owed to Mitchell, trustee. The fund is not thereby identified, any more than it would be if Mitchell had used the money in his own business, expending it in ways which could not be traced, but charging it to himself upon his private books. Whatever that account could be made to produce would doubtless be subject to the trust, but the keeping of such an account does not in any way identify the fund. As said by JUDGE HINES in *Taylor's Adm'r v. Taylor's Assignee*, 78 Ky. 471, quoting from *Williams*

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v. Rogers, 14 Bush, 788: "Whenever a deposit is made in a bank, the relation of debtor and creditor is established between the bank and the depositor, the identity of the particular money is lost, and the relation between the parties continues the same, whether it is an ordinary or time deposit." If Mitchell had deposited the fund to his individual credit, the bank's indebtedness to him, or whatever could be collected from the bank upon that account, if the bank were insolvent, could be subjected to the claim of the beneficiaries, provided that it could be shown that the indebtedness of the bank to Mitchell was created by the loan of their money; and so whatever is realized upon the claim of the trustee for the Hocker children can be subjected to the payment of their claim.

It is admitted by counsel for appellee that the general rule before the cases cited from Beach was as stated in 2 Story, Eq. Jur. § 1259, as follows: "The right to follow a trust fund ceases when the means of ascertainment fail, which, of course, is the case where the subject-matter is turned into money, and mixed and confounded in a general mass of property of the same description." And see Perry, Trusts, § 841; Pom. Eq. Jur. 1058. The three cases from Wisconsin which support the doctrine contended for by appellee have been overruled by the supreme court of that state in Silk Co. v. Flanders, 58 N. W. 383. We have been cited to no Kentucky case changing the rule laid down in Story. Ellis v. Johnson, 4 Ky. Law Rep. 991, does not appear to do so. In that case it was held that the trust fund could be "distinctly traced," and from the abstract it would seem that it was invested in real estate. In Beavan v. Bank (Ky.) 43 S. W. 242, it appeared that bank stock was taken by a guardian in her own name, and paid for by check upon her personal account, to the credit of which her individual money, as well as trust funds, was indiscriminately deposited; and the court held that the trust moneys had been so intermingled with her individual money that they could not be distinguished. Said the court, through

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JUDGE BURNAM: "To follow the money, however, and impress it with the trusts, as against innocent third persons, it must be distinctly traced, and clearly proven to have been invested in the security sought to be subjected; and if the trust fund has consisted of money, and has been mingled with other moneys of the trustee in one mass, undivided and undistinguishable, and the guardian has made investments generally from the money in his possession, the *cestui que trust* cannot claim specific lien upon the property or funds constituting the investment. Hill, Trustees, p. 522; Ferris v. Van Vechten, 73 N. Y. 118." In King v. Noland (Ky.) 45 S. W. 508, a trust fund of \$1,600 was distinctly traced as being invested in a house, the title to which was taken in the name of the trustee, and in a contest between the *cestui que trust* and an execution creditor it was held that, so far as that fund was concerned, the claim of the *cestui que trust* was superior to that of the creditor, but as to the remainder of the purchase money, which was paid by check upon her individual account, made up of her own funds and trust funds intermingled, the rights of the creditor were held to be superior. Said the court in that case: "If the trustee has appropriated it to his own use, and mingled it with other money belonging to him, so that it cannot be distinguished from his own funds, and made investments from such common fund, creditors are entitled to subject the property as his, and the *cestui que trust* can have no specific lien upon either the property or the money so invested. Hill, Trustees, 522; Beavan v. Bank (Ky.) 43 S. W. 242." And see Robinson v. Woodward (Ky.) 48 S. W. 1082; Woodring v. White, 12 Ky. Law Rep. 505.

In Bank v. Dowd, 38 Fed. 173, commercial paper was indorsed to the bank of which Dowd became receiver, collected, and the proceeds mingled with other moneys of the bank, instead of being forwarded. An equitable lien was claimed on behalf of the Philadelphia bank. The court held that, when Dowd's bank mingled the money collected with its general funds, it was—

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if a breach of trust was committed thereby—a conversion of such money, and the plaintiff became a simple contract creditor, with no claim that had a preference at law over another simple contract debt. Said SEYMOUR, J., delivering the opinion of the court, in reference to a number of cases cited by appellee: “I look upon these cases as introducing a new principle into the old and well-known doctrine of equity, which, with the greatest deference to the courts deciding them, I do not feel at liberty to follow, in advance of any adjudication by the supreme court.” A few months later the case of *Peters v. Bain*, 133 U. S. 670 (10 Sup. Ct. 354) was decided by the supreme court. In that case it appears by the syllabus that: “The individual partners in a private bank were also directors in a national bank, and by reason of their position became possessed of a large part of the means of the national bank, which they used in their own business. They assigned all their property to trustees for the benefit of their creditors. The national bank also suspended, and went into the hands of a receiver. Held, that the receiver was entitled to the surrender of such of the property as had been actually purchased with the moneys of the bank, as he might elect, but that purchases made and paid for out of the general mass could not be claimed by the receiver, unless it could be shown that the moneys of the bank in the general fund at the time of the purchase were appropriated for that purpose.” Said CHIEF JUSTICE WAITE, deciding the case in the circuit court: “The payments were all, so far as now appears, from the general fund then in possession and under the control of the firm. Some of the money of the bank may have gone into this fund, but it was not distinguishable from the rest. The mixture of the money of the bank with the money of the firm did not make the bank the owner of the whole. All the bank could in any event claim would be the right to draw out of the general mass of money, so long as it remained money, an amount equal to that which had been wrongfully taken from its own possession and put

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there. Purchases made and paid for out of the general mass cannot be claimed by the bank, unless it is shown that its own moneys then in the fund were appropriated for that purpose. Nothing of the kind has been attempted here, and it has not even been shown that, when the property in this class was purchased, the firm had in its possession any of the moneys of the bank that could be reclaimed in specie. To give a *cestui que trust* the benefit of purchases by his trustees, it must be satisfactorily shown that they were actually made with the trust funds." When the case was appealed, the supreme court, through CHIEF JUSTICE FULLER, quoted the opinion of MR. JUSTICE BRADLEY in *Frelinghuysen v. Nugent*, 36 Fed. 229, 239: "Formerly the equitable right of following misapplied money or other property into the hands of the parties receiving it depended upon the ability of identifying it, the equity attaching only to the very property misapplied. This right was first extended to the proceeds of the property, namely, to that which was procured in place of it by exchange, purchase, or sale; but if it became confused with other property of the same kind, so as not to be distinguishable, without any fault on the part of the possessor, the equity was lost. Finally, however, it has been held the better doctrine that confusion does not destroy the equity entirely, but converts it into a charge upon the entire mass, giving to the party injured by the unlawful diversion a priority of right over the other creditors of the possessor. This is as far as the rule has been carried. The difficulty of sustaining the claim in the present case is that it does not appear that the goods claimed—that is to say, the stock on hand, finished and unfinished—were either in whole or in part the proceeds of any money unlawfully abstracted from the bank." The court then said: "The same difficulty presents itself here, and while the rule laid down by MR. JUSTICE BRADLEY has been recognized and applied by this court (*Central Nat. Bank v. Connecticut Mut. Life Ins. Co.*, 104 U. S. 54, 67, and cases cited), yet, as stated by the chief justice, 'pur-

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chases made and paid for out of the general mass cannot be claimed by the bank, unless it is shown that its own moneys then in the fund were appropriated for that purpose.' "

The supreme court has, therefore, carried the doctrine further than it has been carried in any Kentucky case to which we have been cited. But the rule, even as there stated, does not sustain the contention of appellee. The same difficulty presents itself here. It does not appear by any averment that any of the trust fund was contained in the assets of the bank which came to the hands of the assignee. The act of March, 1894, now in force, had not been passed at the date of the bank's assignment, and does not, therefore, govern the distribution of the estate. It follows, therefore, that the court erred in overruling the demurrer to the petition as amended, and the judgment is, therefore, reversed.

NOTES.

Trust Funds—Diversion—Recovery.—Funds impressed with a trust which have been wrongfully diverted may be followed and reclaimed by the *cestui que trust*, if they are susceptible of identification, and have not passed to *bona fide* purchasers without notice. 2 Story's Eq. Jur. § 1258; Tiff. & Bull. Tr. & Trust. 33; 2 Pom. Eq. Jur. § 1048; Pennell v. Deffell, 4 De Gex. M. & G. 388; Overseers v. Bank, 2 Gratt. (Va.) 544, 44 Am. Dec. 399; Kirby v. Wilson, 98 Ill. 240; Ferris v. Van Vechten, 73 N. Y. 113; Wells v. Robinson, 13 Cal. 134; George v. Ransom, 14 Cal. 658; Lathrop v. Bampton, 31 Cal. 17, 89 Am. Dec. 141; Knatchbull v. Hallett, L. R. 13 Ch. Div. 696; Taylor v. Plumer; 3 Maule & S. 562; Van Alen v. American Bank, 52 N. Y. 1; Trecothick v. Austin, 4 Mason 16; Farmers', etc., Bank v. King, 57 Pa. St. 202, 98 Am. Dec. 215; McLeod v. First Nat. Bank, 42 Miss. 99; First Nat. Bank v. Hummel, 14 Colo. 259, 20 Am. St. Rep. 257; Johnson v. Ames, 11 Pick. 173; Smith v. Combs, 49 N. J. Eq. 420; Parker v. Jones, 67 Ala. 234; Third Nat. Bank v. Stillwater Gas Co., 36 Minn. 75; People v. City Bank, 96 N. Y. 32; Englar v. Offutt, 70 Md. 78, 14 Am. St. Rep. 332; Thompson's Appeal, 22 Pa. St. 16; Isom v. First Nat. Bank 52 Miss. 902; Newton v. Porter, 69 N. Y. 133, 25 Am. Rep. 152; Union Nat. Bank v. Goetz, 138 Ill. 127, 32 Am. St. Rep. 119; Phillips v. Overfield, 100 Mo. 466; Treadwell v. McKeon, 7 Baxt. 201; Oliver v. Piatt, 3 How. 333; Central Nat. Bank of Baltimore v. Connecticut M. L. Ins. Co., 104 U. S. 54; Cook v. Tullis, 18 Wall. 332; Huckabee v. Billingsley, 16 Ala. 414, 50 Am. Dec. 183.

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Same—Same—Identification.—But when such funds are not susceptible of identification, the right of the *cestui que trust* fails. Tiff. & Bull. Tr. & Trusts. 33; Union Nat. Bank of Chicago v. Goetz, 138 Ill. 127, 32 Am. St. Rep. 119; Trustees v. Kirwin, 25 Ill. 73; Taylor v. Plumer, 3 Maule & S. 562; Knatchbull v. Hallett, L. R. 13 Ch. Div. 69; Johnson v. Ames, 11 Pick. 173; Goodell v. Buck, 67 Me. 514; Illinois, etc., Bank v. First Nat. Bank, 15 Fed. Rep. 858; Ferris v. Van Vechten, 73 N. Y. 113; Neely v. Rood, 54 Mich. 134, 52 Am. Rep. 802; U. S. v. Waterborough, 2 Ware 158; Portland, etc., Co. v. Locke, 73 Me. 370; Roach v. Caraffa, 85 Cal. 436; Wetherell v. O'Brien, 140 Ill. 146, 33 Am. St. Rep. 221, in which case the court said: "When money which is delivered to a bank, even though it be for some specified purpose, as, for instance, investment in a mortgage security, has been mingled with the funds of the bank, as was done here, there is no reason why the depositor should be preferred above any other creditor. Where a trustee changes the form of the trust property, the right of the beneficial owner to reach it and compel its transfer may still exist if the property can be identified as a distinct fund, and is not so mixed up with other moneys or property that it can no longer be specifically separated. 'If the trust property has been transferred to a *bona fide* purchaser for value without notice, or has lost its identity, the beneficial owner must, and under other circumstances he may, resort to the personal liability of the wrong-doing trustee': 2 Pomeroy's Equity Jurisprudence, sec. 1058. Where a trustee has converted a trust fund into money and mingled it with his other moneys, so that it cannot be separated from the latter, the beneficial owner occupies the position of a general creditor of the estate, and cannot follow the fund into the hands of an assignee for the benefit of creditors: Illinois, etc., Sav. Bank v. Smith, 21 Blatchf. 275, and cases there cited. Its identification is a prerequisite to the exercise of the right to follow it: 2 Story's Equity Jurisprudence, sec. 1259. While it may not be necessary to point to the particular pieces of money or the particular bank bills that were deposited with the trustee, if the trust property be money, yet there must be a preservation of the distinctness of the trust fund. The means of ascertaining the identity of the fund fails where the money has 'been mixed and confounded in a general mass of property in the bank of the same description': Doyle v. Murphy, 22 Ill. 502, 74 Am. Dec. 165; School Trustees v. Kirwin, 25 Ill. 73. We have said in the recent case of Union Nat. Bank v. Goetz, 138 Ill. 127, 32 Am. St. Rep. 119, 'that trust funds can only be pursued when they can be clearly distinguished from other property held by the trustee or by those representing him.'"

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FIRST NAT. BANK OF SHARON, PA.,

v.

VALLEY STATE BANK OF HUTCHINSON *et al.*

(*Supreme Court of Kansas, June 10, 1899.*)

Deposit by Agent—Trust—Notice to Bank.*—When an agent, rightfully in possession of his principal's money, deposits it in a bank of which he is president to his own credit and as a part of his general deposit account, and tells the cashier the name of the person to whom it belongs, and instructs him to remit it to the owner, but the remittance is not made, and the agent in a short time checks against the general balance of the account, inclusive of the deposit in question, reducing it far below the amount of such deposit, the bank has the right to presume that the agent knows the remittance has not been made and has revoked the order to make it, and that the checking out of the deposit by the agent is within the authorized terms of his agency; and in such case the bank will not be charged with notice of a trust in favor of the owner of the money to the extent of the deposit made by the agent.

Same—Same—Bank's Lien.—Nor does the trust in favor of the owner of the money arise if subsequently, and at a time when the agent's general deposit is below the amount of his principal's money deposited by him, he discovers that the remittance has not been made, and therefore directs that the balance to his credit be applied upon his debt due to his principal, if he is also at the same time indebted to the bank, and it chooses to assert its lien upon his funds for its protection; but the bank may refuse to do as directed, and instead thereof may apply the balance of his account to the payment of a debt which the agent in his individual liability owes to it.

DOSTER, C. J., dissenting.

(Syllabus by the Court.)

ERROR by plaintiff from Reno county district court.
Affirmed.

W. M. Whitelaw and *Frank S. Whitelaw*, for plaintiff in error.

Prigg & Williams, for defendants in error.

*See *Munnerlyn v. Augusta Sav. Bank*, 88 Ga. 333, 30 Am. St. Rep. 159; *Freeholders v. Newark Nat. Bank*, 48 N. J. Eq. 51; *State Nat. Bank v. Reilly*, 124 Ill. 464; *Hemphill v. Yerkes*, 132 Pa. St. 545, 19 Am. St. Rep. 607.

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DOSTER, C. J. This was an action brought by the plaintiff in error to recover money as a trust fund belonging to it, which had been deposited in a bank by another in his name. October 25, 1895, one C. B. Evans executed to one W. E. Hutchinson a promissory note for \$4,500, and secured it by a mortgage on 250 head of cattle. Hutchinson immediately transferred this note and mortgage to one M. B. Abell, of Kansas City, Mo., who in turn immediately transferred them to plaintiff in error. Immediately after or possibly before this last transfer Hutchinson, as the agent of Abell, shipped the cattle to Kansas City, and sold them for \$5,540. This sum was sent through the medium of a bank in Kansas City to one of the defendants in error, the Valley State Bank, and placed to the credit of Hutchinson in a general deposit account kept by him. Hutchinson at that time was president of this bank. November 1, 1895, Hutchinson informed one Wilfley, the cashier of the Valley State Bank, that the deposit to his credit of the \$5,540 was the proceeds of the sale of the cattle mortgaged by Evans to him to secure the note of \$4,500, and which he had transferred to Abell, and that he desired his account debited with \$4,500, and the amount remitted to Abell in payment of the note. Wilfley replied that he would do as desired, and Hutchinson supposed that he had done so. However, he did not do so, which fact Hutchinson discovered about January 3, 1896. Intermediate the giving of the direction to the cashier and the discovery that it had not been complied with, Hutchinson made additional deposits of his own funds to the credit of his general account, and drew checks upon it. Often the credit side of his account, including the before-mentioned deposit of \$5,540, was less than the \$4,500 he had directed to be remitted, running at one time as low as about \$500; so that Hutchinson must have known that the remittance was not made to Abell, or else must have known he was largely overdrawing his account. When Hutchinson discovered that the Abell note had not been paid he had to his credit at the bank \$3,800.

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He borrowed \$700 more from the bank, giving his note therefor, and directed that the \$3,800 to his credit and the amount borrowed be remitted to Abell in payment of the \$4,500 note, of which he still supposed Abell to be the owner. The assistant cashier, one Welsh, objected to the use of these funds for the payment of the Abell note, because Hutchinson was, and for several months had been, indebted to the bank in the amount of another note for \$4,500, also given to him by the before-mentioned Evans, which note Hutchinson had sold and indorsed, and which upon its maturity the bank had paid for him as indorser, and which it still held against him as an obligation due to it. According to the desire of Welsh, the money was not remitted in payment of the Abell note, but was used to discharge Hutchinson's indebtedness due to the bank on the other note; that is, Hutchinson's deposit account of \$3,800, increased by the \$700 loan, was debited with the amount of his note. It is not clear whether Hutchinson finally assented to this arrangement. As to all other facts above stated there is no substantial dispute. The Valley State Bank went out of business, and turned its assets over to the bank of Hutchinson, which bank became insolvent and is in the hands of John M. Kinkel, as receiver. Without going into a detailed explanation, it is sufficient to say that, under the circumstances shown in evidence, if the Valley State Bank was liable to the plaintiff in error, the First National Bank of Sharon, Pa., the Bank of Hutchinson and Kinkel, as its receiver, are likewise liable. The district court held in favor of the defendants, and the plaintiff prosecutes error to this court.

Counsel for plaintiff in error vehemently assert that the deposit of \$5,540, the proceeds of the sale of the mortgaged cattle, was charged with a trust to the extent of the note of \$4,500, which had been transferred to Abell and to the plaintiff in error, and that the Valley State Bank was charged with notice of such trust when informed by Hutchinson of the source from which the deposit of

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—Trust—Notice
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cattle money was derived, and was directed to remit the necessary amount in payment of the note. It is without doubt true that an agent cannot make the funds in his hands belonging to his principal his own funds by depositing them to his own credit in a bank. He cannot, as to the bank, make them his own funds if the bank has notice of the real ownership, provided the bank still has them or their representative on hand so they can be followed and reclaimed by the real owner. The difficulty, however, in such a case as this, is to determine the extent of the agent's authority over the fund, after he has deposited it to his credit, when no notice of ownership other than what the agent himself imparts is given to the bank. Does the agent depositing his principal's fund in his own name part, as against the bank, with all dominion or authority over so much of his general account as is represented by the deposit in question by merely stating to the bank that it belongs to another, and directing it to be paid to him? Can the agent by so doing impose a trust upon the bank, and require the bank to set apart, as it were, so much of the general fund as it is informed belongs to another, so that not even the agent and depositor, any more than a stranger, can exercise control over it? We think not. Upon this precise question, to which the contention of the parties becomes reduced, we have not been favored by counsel on either side with any authorities, or with any close reasoning, and with the amount of other labor necessarily devolving upon us we are unable ourselves to brief cases, as it were, or make much original research among the books. To the extent that we have been able to investigate we have found no cases involving the precise question. The fact that Hutchinson was in possession of the fund derived from the sale of the mortgaged cattle was sufficient evidence to the bank that he had the right, as agent, to control the fund, —was sufficient evidence that the principal had put him in the possession of such fund. As agent he could make payments to the principal in any recognized

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business way he chose, and, so far as concerned the bank, could make it at any time and in such installment payments as he chose. If the bank had learned from any other source than Hutchinson himself that the deposit was the proceeds of the sale of cattle mortgaged to Abell, or to the plaintiff in error, could it have raised a question with Hutchinson as to his control of the fund thus derived and thus deposited by him? Could it have refused to honor Hutchinson's checks drawn against it or against the general balance inclusive of it, upon the ground that it was not Hutchinson's money, but was somebody else's, in whose interest it must keep and hold the deposit? We think not. It would have been bound to assume that Hutchinson's rightful possession of the fund justified him in dealing with it as he did and in checking upon it as he chose. It would be bound to assume that an agreement existed between Hutchinson and the owner of the fund which justified the former in keeping it in his own name and checking upon it as he did. It would be bound to assume that Hutchinson was dealing with the fund within the terms of an authorized agency. If this be true, it would make the case nowise different if the information as to the ownership of the fund and the source from which derived came from Hutchinson, instead of some one else or in some other way. If this be true, it could make no difference that Hutchinson gave the cashier, Wilfley, a direction to remit the entire amount to the owner. Until this was done the fund, so far as the bank and Hutchinson were concerned, did not pass beyond the control of the latter. Such an order to the cashier was not irrevocable. If revoked, the bank could assume that Hutchinson had changed his mind as to the time and manner of payment, and that he was still acting within the terms of his agency, or had received new directions from his principal. As stated before, no authorities directly in point have been cited to us; nor have we, in the cursory examination made, found any directly in point. A case which substantially involves the

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principle, though differing somewhat from it in point of fact, is *Munnerlyn v. Bank*, 88 Ga. 333, 14 S. E. 554. In that case it was ruled: "When a trustee deposits money in a bank to his credit as agent, the bank is discharged by paying it back to the person who made the deposit, and, in the absence of notice or knowledge to the contrary, has the right to assume that he will appropriate the money to its proper uses and trusts." There can be no substantial difference between a case where an agent makes a deposit of money as "agent," thus informing the bank that the fund is not in reality his, and one in which the agent makes the deposit in his own name, but at the same time informs the bank that he is only the agent of another for it. In both cases the bank would have the right to assume that the agent in dealing with the fund was acting within the terms of his agency. Especially was this true in the case of the Valley State Bank. It had the right to assume that, on account of Hutchinson's presidency of it and his presumptive familiarity with its business, he knew the remittance had not been made, and, knowing it had not been made, had concluded to do otherwise with the fund in question.

The cases of *National Bank v. Insurance Co.*, 104 U. S. 54, and *Van Alen v. Bank*, 52 N. Y. 1, cited by counsel for plaintiff in error, are not cases where the

agent had checked out the amount of the deposit as Hutchinson had done; but they

Name—Same—
Bank's Lien.

were cases in which the fund still existed in the agent's name, and in both instances the question reduced to the ultimate was whether the fact of its being the fund of another than the agent could be shown by the equitable owner. This is not our question. The conclusion being that a trust did not attach to Hutchinson's general deposit in favor of Abell or other assignee of the mortgage, it follows that none subsequently attached by the new direction given on the 3d of January to remit the balance of \$3,800 of deposit to Abell in payment upon the mortgage note.

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That was nothing more than a direction by Hutchinson to use his money to pay his debt. At that time the bank was demanding from Hutchinson repayment of the money it had advanced to him with which to discharge the other note. Upon any funds shown by the books to belong to Hutchinson, and concerning which it had no other knowledge, it had a banker's lien, which it could enforce as against him and as against any of his general creditors. 1 Morse, Banks, § 324 *et seq.* It did enforce that lien by debiting Hutchinson's account with a proportionate amount of the indebtedness due to it. Besides, as before stated, it is not clear that Hutchinson did not assent to the action of the bank. The court specially found upon that subject as follows: "The evidence does not show, by a preponderance thereof, that there was an agreement upon the part of the Valley State Bank, by any of its officers, with W. E. Hutchinson, that the \$700 loaned to Hutchinson, mentioned in the preceding finding, and the balance of of \$3,800 credit on Hutchinson's general account with the bank, should be used by the bank or its officers in payment of the note in suit, and no part of said sums were at any time set apart for the purpose of paying the note in suit." The general finding having been against the plaintiff in error, we are bound to assume that as finally made it was against it upon that specific point. If Hutchinson borrowed the \$700 for the purpose of applying it upon the Abell note, and the bank knew this intention when it made the loan to him, it would be bound to permit its application to the intended purpose. It would be held to have waived its lien upon the fund thus loaned, and to have agreed to Hutchinson's use of it in the discharge of his other debt,—in fact, would be held to have made the loan to him for that purpose. The burden of proof as to the making of this agreement or the occurrence of facts from which the agreement could be implied rested upon the plaintiff. That burden, as the court finds, was not discharged by a preponderance of the evidence. In the absence of an assent express or implied upon the

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part of the bank to allow the use of the money loaned for a specific purpose, it would, when passed to Hutchinson's credit, become covered as his other funds were by the lien of the bank. The judgment of the court below will be affirmed.

JOHNSTON and SMITH, JJ., concurring.

DOSTER, C. J. (dissenting). I very much doubt the soundness of the principal conclusions reached in the foregoing opinion. In the lack of directly supporting authority, I dissent. I think that in some instances the doctrine of the impressibility of funds in the hands of banks and other custodians with trusts in favor of equitable claimants has been carried to an extreme length in this state, and took occasion to so remark in *Insurance Co. v. Caldwell*, 59 Kan. 160, 52 Pac. 440; but the decision in this case seems to be subject to the opposite criticism. I think the information given to the cashier, Wilfley, by Hutchinson, charged the bank with knowledge of the trust character of the deposit made.

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GALE.

(*Supreme Court of the United States, May 15, 1899.*)

Discounting Accommodation Paper with Knowledge of Its Nature.*—The mere knowledge on the part of the officers of a bank, when discounting paper, that it was drawn for accommodation, will not prevent the bank from recovering thereon.

Accepting Accommodation Paper as Payment of Antecedent Debt—Sufficiency of Evidence.—It was contended that the plaintiff bank could not recover on an accommodation note discounted by it, because it took the note for an antecedent debt of the person for whom it was discounted. *Held*, that this proposition of fact was unsupported by the record, and, therefore it was unnecessary to point out the unsoundness of the legal contention.

*See note at end of case.

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ERROR by defendant to the United States Circuit Court of Appeals for the Second Circuit. *Affirmed.*

Frank Sullivan Smith and David Willcox, for plaintiff in error.

Martin Carey and W. S. Bissell, for defendant in error.

MR. JUSTICE WHITE delivered the opinion of the court.

The receiver of the Elmira National Bank, duly appointed by the comptroller of the currency, sued George M. Israel, the plaintiff in error, on a promissory note for \$17,000, dated New York, May 14, 1893, due on demand, and drawn by Israel to the order of the Elmira National Bank, and payable at that bank. The defenses to the action were, in substance, these :

First. That the note had been placed by Israel, the maker, in the hands of David C. Robinson, without any consideration, for a particular purpose, and that, if it had been discounted by Robinson at the Elmira National Bank, such action on his part constituted a diversion from the purposes for which the note had been drawn and delivered ; that from the form of the note (its being made payable to the bank), from the official connection of Robinson with the bank, he being one of its directors, and his personal relations with the cashier of the bank, as well as from many other circumstances which it is unnecessary to detail, the bank was charged with such notice as to the diversion of the note by Robinson as prevented the bank from being protected as an innocent third holder for value.

Second. Even if the discount of the note was not a diversion thereof from the purpose contemplated by the drawer, the bank was nevertheless subject to the equity arising from the want of consideration between Israel, the drawer, and Robinson, because, although the note may have been, in form, discounted by the bank, it had in reality only been taken by the bank for an antecedent debt due it by Robinson. And from this it is asserted

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that as the bank had not parted, on the faith of the note, with any actual consideration, it was not a holder for value, and was subject to the equitable defenses existing between the original persons.

At the trial the plaintiff offered in evidence the note,—the signature and the discount thereof being in effect admitted,—and then rested its case. The defendant thereupon offered testimony which it was deemed tended to sustain his defenses. At the close of the testimony the court, over the defendant's exception, instructed a verdict in favor of the plaintiff. On error to the court of appeals, this action of the trial court was affirmed. 23 C. C. A. 274, 77 Fed. 532.

Both the assignments of error and the argument at bar but reiterate and expand, in divers forms, the defenses above stated, and which it is asserted were supported by evidence competent to go to the jury, if the trial court had not prevented its consideration by the peremptory instruction which it gave.

The bill of exceptions contains the testimony offered at the trial, and the sole question which arises is, did the court rightly instruct a verdict for the plaintiff? From the evidence it undoubtedly resulted that the note was delivered by the maker to D. C. Robinson, by whom it was discounted at the Elmira National Bank. It also established that Robinson at the time of the discount was a director of the bank; had large and frequent dealings with it; that he bore close business and personal relations with the cashier, and occupied a position of confidence with the other officers and directors of the bank. The occasion for the giving of the note, and the circumstances attending the same, are thus shown by the testimony of the defendant:

"I reside in Brooklyn. I am 42 years of age. I am at present engaged in the insurance business. In the months of April and May, 1893, I was employed in the banking house of I. B. Newcomb & Co., in Wall street, New York, as a stenographer and typewriter. I was not then, and am not now, a man of property. I know D. C. Robinson. At the time I made this note I did

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not receive any valuable thing or other consideration for the making of it. I have never received any consideration for the making of the note. I had a conversation with D. C. Robinson at the time of the making of the note. He stated to me the object or purpose for which he desired the note. He said to me that he desired some accommodation notes, and he wanted us clerks to make them, and stated the amount. He said that the reason he wanted the accommodation note was that he had exceeded his line of discount, and could not get any more accommodation; that he was building a power house up there [in Elmira], and needed some money to accomplish that purpose; and that, if we would give him these notes, it would enable him to accomplish that. He also added that we would not be put in any position of paying them at any time, that he would take care of them, and gave us positive assurance on that point; and naturally, knowing the man, and thinking that he was a millionaire, as he probably was at that time, we had no hesitation about going on the notes."

There was no testimony tending to refute these statements, or in any way calculated to enlarge or to restrict them.

The defense, then, amounts to this: That the form of the paper, and Robinson's relation with the bank and its officers, were such as to bring home to the bank the knowledge of the transaction from which the note arose, and that such knowledge prevents a recovery, because Robinson, taking the transaction to be exactly as testified to by the defendant, was without authority to discount the note. Granting, *arguendo*, that the testimony tended to show such a condition of fact as to bring home to the bank a knowledge of the transaction, the contention rests upon a fallacy, since it assumes that the note was not given to Robinson to be discounted, and that his so using it amounted to a diversion from the purpose for which it was delivered to him. But this is in plain conflict with the avowed object for which the defendant testified the note was drawn and delivered, since he swore that he furnished

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the note because he was told by Robinson that he needed accommodation, that his line of discount on his own paper had been exceeded, and that, if he could get the paper of the defendant, he would overcome this obstacle ; in other words, that he would be able successfully to discount the paper of another person, when he could not further discount his own. This obvious import of the testimony is fortified, if not conclusively proven, by the form of the note itself, which, instead of being made to the order of Robinson, was to the order of the Elmira National Bank. The premise, then, upon which it is argued that there was proof tending to show that the discount of the note by Robinson at the Elmira National Bank was a diversion, is without foundation in fact. The only matters relied on to sustain the proposition that there was testimony tending to establish that the note was diverted, because it was discounted at the bank to whose order it was payable, are unwarranted inferences drawn from a portion of the conversation, above quoted, which the defendant states he had with Robinson when the note was drawn and delivered. The part of the conversation thus relied upon is the statement that Robinson said when the note was given "that he was building a power house up there [in Elmira], and needed some money to accomplish that purpose, and, if we would give him these notes, it would enable him to accomplish that." This, it is said, tended to show that the agreement on which the note was given was not that it should be discounted at the Elmira National Bank, but that it should be used by Robinson for obtaining money to build the power house. In other words, the assertion is that the mere statement by Robinson of the causes which rendered it necessary for him to obtain a note to be discounted at the Elmira National Bank had the effect of destroying the very purpose for which the note was confessedly given. When the real result of the contention is apprehended, its unsoundness is at once demonstrated. Other portions of the record have been referred to in argument as

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tending to show that it could not have been the intention of the defendant, in giving the note, that Robinson should discount it; but, on examining the matters thus relied upon, we find they have no tendency whatever to contradict or change the plain result of the transaction as shown by the defendant's own testimony.

As the discount of the note at the Elmira National Bank was not a diversion, but, on the contrary, was a mere fulfillment of the avowed object for which the note was asked, and to consummate which it was delivered, it becomes irrelevant to consider the various circumstances which it is asserted tended to impute knowledge to the bank of the purpose for which the note was made and delivered. If the agreement authorized the discount of the note, it is impossible to conceive that knowledge of the agreement could have caused the discount to be a diversion, and that the mere knowledge that paper has been drawn for accommodation does not prevent one who has taken it for value from recovering thereon is too elementary to require citation of authority.

The contention that, although it be conceded the note was not diverted by its discount, nevertheless the bank could not recover thereon, because it took the note for an antecedent debt, hence without actual consideration, depends—First, upon a proposition of fact (that is, that there was testimony tending to so show); and, second, upon the legal assumption that, even if there was such testimony, it was adequate as a legal defense. The latter proposition it is wholly unnecessary to consider, because the first is unsupported by the record. All the testimony on the subject of the discount of the note was introduced by the defendant in his effort to make out his defense. It was shown, without contradiction, that the note had been discounted by Robinson at the bank, and that the

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proceeds were placed to his credit in account. It was also shown that for some time prior to the day of the discount his account with the bank, to the credit of which the proceeds of the discount were placed, was overdrawn. The exact state of the account on the day the discount was made was stated by the cashier and a bookkeeper of the bank, and was moreover referred to by Robinson. On the morning of the discount the debit to the account of Robinson, by way of overdraft, is fixed by the cashier at \$35,400, and by the bookkeeper at \$35,000. Robinson made the following statement: "The amount of other notes wiped out the overdraft and made a balance." The bookkeeper's statement is as follows:

"There was an overdraft of \$35,000 against Mr. Robinson upon the books of the bank on the morning of May the 4th. There were items coming through the exchanges that amounted to about \$73,000, and there was a deposit made of \$33,000 to make the overdraft good. These were to take up the items that came through the exchanges. I think that was the way of it. His account would have been overdrawn that night for about \$50,000, if it had not been for the entry on the books of the proceeds of these notes."

No other testimony tending to contradict these statements made by the defendant's own witnesses is contained in the record. They manifestly show that although at the date of the discount there was a debit to the account, resulting from an overdraft, nearly the sum of the overdraft was covered by items of credit, irrespective of the note in controversy, and that subsequent to the credit arising from the note more than the entire sum of the discount was paid out for the account of Robinson, to whose credit the proceeds had been placed. With these uncontradicted facts in mind, proven by the testimony offered by the defendant, and with no testimony tending the other way, it is obviously unnecessary to go further, and point out the unsoundness of the legal contention relied upon.

Affirmed.

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Accommodation Paper—Knowledge of Its Nature as Affecting Recovery by Holder.—The mere knowledge that paper has been drawn for accommodation does not prevent one who has in good faith taken it for value from recovering thereon. *Union Bank v. Crine*, 33 Fed. Rep. 809; *Molson v. Hawley*, 1 Blatchf. (U. S.) 409; *Armstrong v. Scott*, 36 Fed. Rep. 63; *U. S. Bank v. Weisiger*, 2 Pet. (U. S.) 331; *Yeaton v. Alexandria Bank*, 5 Cranch (U. S.), 49; *Marks v. First Nat. Bank*, 79 Ala. 550; *Ross v. Whitefield*, 1 Sweeny (N. Y.) 318; *Montross v. Clark*, 2 Sandf. (N. Y.) 115; *Portland First Nat. Bank v. Schuyler*, 39 N. Y. Super. Ct. 440; *Davis v. Dayton*, 7 Misc. Rep. (N. Y. C. Pl.) 488; *Leeke v. Hancock*, 76 Cal. 127; *Cady v. Shepard*, 12 Wis. 639; *Wilbur v. Williams*, 16 R. I. 242; *Duncan v. Gilbert*, 29 N. J. L. 521; *Marr v. Johnson*, 9 Yerg. (Tenn.) 1; *Capital City Bank v. Des Moines Cottonmill Co.*, 84 Iowa 561; *Maitland v. Citizens' Nat. Bank*, 40 Md. 540, 17 Am. Rep. 620; *Newbury Bank v. Rand*, 38 N. H. 166; *Stephens v. Monongahela Nat. Bank*, 88 Pa. St. 157, 32 Am. Rep. 438; *Lord v. Ocean Bank*, 20 Pa. St. 384, 59 Am. Dec. 728; *Carpenter v. Republic Nat. Bank*, 106 Pa. St. 170; *Quinn v. Hard*, 43 Vt. 375, 5 Am. Rep. 284; *Faulkner v. Faulkner*, 73 Mo. 338; *Warder v. Gibbs*, 92 Mich. 29; *Best v. Nokomis Nat. Bank*, 76 Ill. 608; *Davis v. Randall*, 115 Mass. 547, 15 Am. Rep. 146; *Marsh v. Low*, 55 Ind. 271; *Fant v. Miller*, 17 Gratt. (Va.) 48.

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v.

CITIZENS' BANK OF UNION CITY *et al.**(Supreme Court of Indiana, June 13, 1899.)*

Collections—Insolvency—Right to Mingle with Own Funds—Banking Customs.*—The usual and ordinary custom by which banks are generally controlled in collecting paper does not require them to hold the money collected separate and apart from its own funds and remit the identical money collected. And when the money is collected, and the proper credit given to the person by whom the paper was sent for collection, as a general rule, the relation of debtor and creditor is created between the bank and such person, and the relation of trustee and *cestui que trust* does not arise. And the fact that the bank is insolvent when the proceeds of the paper are mingled with its own funds is immaterial in this connection, if its officers are not aware of its insolvency.

APPEAL by plaintiff from Randolph county circuit court. *Affirmed.*

*See note at end of case.

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Bell & Ross, for appellant.

J. W. Thompson, for appellees.

JORDAN, C. J. This cause was submitted to the lower court as an "agreed case" upon a statement of facts, as provided by section 562, Burns' Rev. St. 1894 (section 553, Rev. St. 1881; section 553, Horner's Rev. St. 1897). The following are substantially the material facts in the case: Appellant is a national bank organized under the laws of the United States, and as such institution is engaged at Kewanee, Ill., in conducting a general banking business. The Citizens' Bank of Union City, appellee herein, prior to being placed in the hands of a receiver, was a state bank organized under the laws of this state as a bank of discount and deposit, and on May 5, 1896, and prior thereto, was engaged in doing a general banking business at Union City, Ind. This bank, on April 20, 1896, and continuously thereafter until its suspension, was insolvent. On May 7, 1896, by reason of its insolvency, it closed its doors, and suspended business, and its doors were not again opened for business after that date. On the morning of May 9, 1896, the state bank examiner, under the laws of the state, took possession thereof, and the bank remained in his possession until the 16th of that month, when it was placed in the hands of appellee Canadey, the receiver appointed as such by the proper court. On May 1, 1896, appellant bank was the *bona fide* holder of a certain promissory note for over \$1,000 in amount, executed by the Knapp Supply Company, a corporation located and doing business at Union City, Ind. This note was payable at the Citizens' Bank. Appellant, on May 1, 1896, indorsed this note for collection, and sent it to the Citizens' Bank, with instructions to collect and remit. The note was received by the latter bank on May 2, 1896, and was duly entered by the bank on its register for collection. The note was presented, on the same day it was received, for payment to the maker thereof, the supply company. This latter company was on that day, and for a long time prior thereto had been,

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a depositor of the Citizens' Bank, having therein on deposit, at the time the note was presented to it for payment, funds far in excess of the amount of the note. The supply company, at the time the note was presented to it for payment, drew its check upon the Citizens' Bank for \$1,157.83, the amount due upon the note, which check was accepted by the Citizens' Bank as a payment in full of the note. The bank thereupon canceled the paper as paid, and delivered it to said company, and charged the amount of the check to said company's deposit account, the same being sufficient to more than pay and satisfy the check. The amount so collected by the Citizens' Bank in payment of appellant's claim was entered on its collection register as a credit on said collection, and on May 4th, the next business day after the payment of the note (the 3d being Sunday), the Citizens' Bank drew its sight draft in favor of appellant for the full amount of the collections (less charges) on the Merchants' National Bank of Cincinnati, Ohio. This latter bank was the regular correspondent of the Citizens' Bank, and when this sight draft was drawn the Citizens' Bank had as a depositor in the Merchants' National Bank an account in its favor in excess of the amount of said draft. On May 5th this draft was mailed by the Citizens' Bank to appellant as a remittance of the proceeds of the note collected in the manner stated, and, without notice or knowledge of the insolvency of the Citizens' Bank upon the part of appellant, the draft was received by it, and on the following day, through its regular correspondent bank in the city of Chicago, Ill., was forwarded to the Merchants' National Bank for payment. On May 9, 1896, the draft was presented to the Merchants' National Bank for payment, but payment thereof was refused, and the draft protested, for the reason that the Merchants' National Bank had previously received notice of the failure and suspension of the Citizens' Bank. At the time the latter bank passed under the control of a receiver it had

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on hand in its vaults as the entire amount of money in actual cash \$159, which consisted in the main of small coins and change, and did not include any of the credits or money on deposit in the Merchants' National Bank belonging to it. At the time the Citizens' Bank suspended and closed its doors, and on the day the sight draft was presented for payment at the Merchants' National Bank, its deposits in the latter bank amounted to \$2,260.44; and this amount of money has been paid over to the receiver, and is now in his hands. The agreed statement of facts also shows that on May 2, 1896, the day on which the note in question was received for collection, the Citizens' Bank had, as cash on hand, the sum of \$7,206, and on the morning of May 4th it had \$6,953, and on the morning of the 5th, \$6,194, and on the 6th, \$5,114. On May 2d the Citizens' Bank, in the usual course of business, bought, paid for, and cashed checks, drafts, and bills of exchange on other persons and banks to the total amount of \$125.85, and on the same day sent these checks, drafts, and bills to the Merchants' National Bank, and obtained credit for the same as a deposit. On May 4th, in its usual course of business, it also bought, paid for, and cashed checks, drafts, and bills of exchange amounting in all to \$2,954.56, and on the same day these were forwarded to said correspondent, and credit therefor received. On May 5th it bought, paid for, and cashed drafts and bills of exchange to the amount of \$368.93, and these were sent on the same day to the Merchants' National Bank, and credit obtained therefor. According to the showing of the daily entries made in the books and records of the Citizens' Bank, it had on hand May 2, 1896, at the close of the day's business in its safe, as cash, \$13,589.93, and a total cash item of \$24,590.01; on the 4th of May, accepting the authority of its books, it had on hand as cash \$10,926, and a total cash item of \$23,110.93; and on the 5th of May, \$10,001.11, and a total cash item of \$21,815.08; and on May 6th, \$3,099.46, and a total cash item of \$3,189.36. Of this latter

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amount the receiver has received in cash, and now has in his hands, the sum of \$2,504.12. The facts show that it was the custom of the Citizens' Bank, when making collections for persons or customers residing west of Union City, to remit the amount collected, less collection charges, by means of drafts drawn on the Merchants' National Bank, and that it did not remit the amount so collected in money, and that all of the business connected with the collection of the note in question by the Citizens' Bank was conducted by it in the usual and ordinary way of making collections by banks, but appellant had no notice or knowledge of the insolvency or failure of the Citizens' Bank prior to the protest of the draft sent to it as a remittance of the proceeds of said note. The books of the bank, it is stated, do not show or represent, on the days mentioned, the true and actual amount of cash on hand, but simply show items that were carried on said books, and treated as cash, but in fact were not actual cash on hand; and the amount stated above, as shown by the bank's books to be cash, included amounts which the bank had on deposit with correspondent banks, including also the amount on deposit with the Merchants' National Bank. The questions submitted to the lower court under these facts were: First. Are the funds of the bank, in the hands of the receiver, impressed with a trust in favor of appellant to the amount of its claim? Second. Is it entitled to a preferential right over the general creditors of the insolvent bank? The lower court, under the facts, held that appellant was entitled to recover the full amount of its claim as a contract creditor, but denied its right to enforce a trust, or to be preferred in its claim over those of other creditors, and rendered judgment accordingly.

The question presented for our decision is, did the court err in its conclusions of law upon the facts stated? The principal contentions of appellant's learned counsel are: First. That under the facts the Citizens' Bank is shown to have served, in collecting the note in question, as the agent of appellant, and by mingling

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the proceeds of the claim with its own funds the latter became impressed with such a trust as will entitle appellant to pursue the proceeds, and reclaim them in the hands of the receiver, as its own separate property. Second. That the Citizens' Bank, by accepting the note for collection, and collecting it, and mingling the proceeds thereof with its own, at a time when it is shown to have been insolvent, was, under the circumstances, guilty of fraud, and for that reason cannot be held to have acquired any title to either the note or the money arising out of its collection. In regard to the second contention, it may be said that the rule is generally asserted and enforced that where a party has been induced to part with his property, through the fraud of another, under the color or guise of a contract, he has the right, upon discovering the fraud, to rescind, and reclaim his property, unless it has passed into the hands of a *bona fide* holder. The general rule also sustained by the authorities is that a bank intrusted with a collection of a claim cannot hold the proceeds thereof against the owner if, at the time of receiving the claim for collection, the bank was insolvent, and its officers or agents were aware of, or had notice of, its insolvency. *Railway Co. v. Johnston*, 133 U. S. 566, 10 Sup. Ct. 390; *Bruner v. Bank*, 97 Tenn. 540, 37 S. W. 286; *Friberg v. Cox*, 97 Tenn. 550, 37 S. W. 283; *Rand. Com. Paper* (2d Ed.) § 726. The rule is also well settled that after a bank which holds paper for collection has suspended, and ceased to be a going concern, the general power which it had before its suspension to collect the paper and mingle the proceeds thereof with its own funds, and thereby create the relation of debtor and creditor between it and the person whom it served as collector, terminates, and the proceeds of any collection made, under such circumstances, must be held by the collecting bank as a trustee of the owner. *Boone, Banking*, § 210. But this latter rule, under the facts, can have no application in this action. The agreed statement of facts, which takes the place of all pleadings in this case, does not, however, proceed

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upon the theory that a fraud was perpetrated upon appellant by the Citizens' Bank in collecting the note in question. Therefore fraud, under the agreed statement, which performs the office of a complaint in this cause, cannot be considered as the gravamen of the action. Appellant has the burden in this case, and it is required to clearly and fully show such facts as will entitle it to the relief in question; otherwise, it will fail. The rule applicable to a special verdict or finding obtains, and nothing under the agreed statement can be taken by intendment. Elliott, App. Proc. § 226. The facts show that at the time the Citizens' Bank received and collected the money and drew the draft in favor of appellant for the proceeds thereof it was still a going concern, and so continued until its suspension on the day mentioned. At the time it made the draft, and at the time the latter was presented for payment, it had ample means in the Merchants' National Bank to meet the draft; and it fully appears, under the agreed statement, that all of the business relating to the collection of the note was conducted in the manner usually and ordinarily employed by banks in collecting claims. As to whether the officers of the bank were aware of, or had knowledge of, its insolvent condition, prior to the day of its suspension, is a matter which is left wholly to inference. We are not permitted to infer or presume the existence of facts essential to the establishment of fraud. There is such an absence of facts essential to the recovery upon the grounds of fraud that this feature of the case may be dismissed from further consideration.

We may recur to and consider the question: Did the Citizens' Bank, in collecting the note, become a trustee of appellant, so as to impress the proceeds, when collected, with a trust which may be enforced against the money or property in the hands of the receiver; or is appellant, under the circumstances, simply a contract creditor, entitled to share in the assets of the insolvent bank in like manner as other creditors? It must be conceded that if, by the transac-

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tion of the business in respect to the collection of the note, the relation of creditor and debtor was created between appellant and appellee bank, then the former cannot maintain preferential rights over other creditors, whatever may have been the origin of its claim. Receivers and assignees, of course, take property which comes into their hands for administration subject to all legal and equitable claims; and if appellant, under the facts, can sustain the application of the trust doctrine, for which it contends, its right to enforce the same against the receiver in this action cannot be controverted. *Lamb v. Morris*, 118 Ind. 179, 20 N. E. 746, and cases there cited. The right of a *cestui que trust* to pursue and reclaim trust funds when the same can be identified, and the rights of *bona fide* holders have not intervened, must be conceded. It matters not, so far as the enforcement of this equitable doctrine is concerned, whether the funds impressed with the trust have been traced into the hands of an individual or into the possession of a bank. *Pearce v. Dill*, 149 Ind. 136, 48 N. E. 788; *Bank v. Peters*, 123 N. Y. 272, 25 N. E. 319. The rule which prevails and is generally recognized in regard to bank deposits is that, where a deposit is made in a bank in the ordinary course of business, either of money, or of drafts or checks received and credited as money, the title to the money or to the drafts and checks deposited, in the absence of any special agreement or direction, passes to the bank, and the relation of debtor and creditor arises between the depositor and the bank, without any element of a trust entering into the case. The bank, in such cases, acquires title to the money, checks, or drafts deposited, upon the implied agreement upon its part to pay full consideration for the same when called upon by the depositor in the usual course of business. *Wasson v. Lamb*, 120 Ind. 514, 22 N. E. 729; *Bank v. Acoam*, 125 Ind. 584, 25 N. E. 713; *Lamb v. Morris*, *supra*; *Harrison v. Wright*, 100 Ind. 515; *McLain v. Wallace*, 103 Ind. 562, 5 N. E. 911; *Cragie v. Hadley*, 99 N. Y. 131, 1 N. E. 537. Reducing the facts in the case at

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bar to a minimum, they disclose that appellant and appellee bank were each engaged in doing a general banking business, the former in Illinois and the latter in Indiana. The note was indorsed, and sent for collection by the former to the latter, with the general direction to collect and remit. The latter, it appears, at the time it received the paper and collected it, was insolvent, but was still a going concern, engaged in its usual business of banking. The fact as to whether its officers or agents had notice, at the time the collection was made, that the institution was insolvent, and would be compelled in the near future to suspend business on account of its insolvency, is not expressly disclosed by the agreed statement. The note, it seems, was paid by means of a check drawn by its payee upon the collecting bank, of which such payee was a depositor, and the proceeds were remitted to appellant by means of a sight draft drawn by appellee upon a corresponding bank. All of the acts of the collecting bank in making the collection, it appears, were compatible with the usual and ordinary methods employed by banks in the collections of similar claims. The remittance by draft on the bank in question is shown to have been in accord with the usual custom of the Citizens' Bank in remitting money collected by it for customers residing west of Union City. The draft, which represented the amount arising out of the collection of the note, it seems, was received and forwarded by appellant for payment, and the only thing which intervened to prevent the payment thereof was the subsequent failure and suspension of the collecting bank. Certainly it cannot be asserted that these facts are sufficient to establish a case for the intervention of equity in the enforcement of the trust. The entire business of collecting and remitting the amount of the note was transacted by means of the check and draft, no money being actually received by the collecting bank. The whole business can be said to have been a paper transaction, and there is nothing to show that in the dealings between the two banks it was understood or

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intended that the identical money, when collected, was to be remitted. The fact that appellant accepted the sight draft, and forwarded the same for payment, is an important factor to show that it approved the method employed by the collecting bank in remitting the proceeds of the collection made, and that fact alone may be considered as showing that appellant, in placing the note for collection, did not contemplate or intend that the remittance of the money should be made otherwise than it was ; and, by accepting the draft without objections, it must be deemed to have ratified the act of the collecting bank in remitting the money by that method. *Rathbun v. Steamboat Co.*, 76 N. Y. 376.

The Citizens' Bank, as we have seen, was a depositor of the Merchants' National Bank of Cincinnati, and as between these two banks, in regard to the funds of the former on deposit in the latter, the relation of debtor and creditor certainly existed. The draft on the latter bank, in favor of appellant, in the event it was paid, would serve to reduce the indebtedness which the Citizens' Bank held against the Merchants' National Bank. The note, as stated, was paid by means of a check drawn by the maker of the paper upon the collecting bank ; and if anything, under the circumstances, can be said to have been set apart by the collecting bank to appellant, it was at amount of the former's indebtedness to the payee of the note as a depositor equal to the amount of the payee's check, which was accepted in payment of the note. Nothing to the contrary appearing, appellant bank is presumed to have sent the collection to appellee bank, and, at least impliedly, consented that it be collected, and the proceeds remitted, according to the usual and ordinary business methods employed by banks in making collections. *Morse, Banks*, § 220. The usual and ordinary custom, by which banks are generally controlled in collecting paper, does not require them to hold the money collected separate and apart from its own funds, and remit the identical money collected. The collecting bank, generally speaking, in the ab-

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sence of any arrangement to the contrary, becomes the owner of the money collected, and is under an obligation to pay or remit, not the very money received, but an amount of equal value; and, while a collecting bank, it is true, receives the paper or claim for collection as the agent of the holder. Still, when the money is collected, and the proper credit given to such holder or owner, then, as a general rule, the relation of debtor and creditor is created between the parties, and the relation of trustee and *cestui que trust* does not arise. This seems to be the prevailing doctrine, and is well supported by the authorities. First Nat. Bank of Crown Point v. First Nat. Bank of Richmond, 76 Ind. 561; Morse, Banks, § 248; Boone, Banking, § 210, and cases cited in footnote 3; Bank v. Rushmore, 28 Ill. 463; Tinkham v. Heyworth, 31 Ill. 519; Akin v. Jones, 93 Tenn. 353, 27 S. W. 669; Marine Bank v. Fulton Bank, 2 Wall. 252; Briggs v. Bank, 89 N. Y. 182; People v. Merchants' & Mechanics' Bank, 78 N. Y. 269; People v. City Bank, 93 N. Y. 582; Bank v. Davis, 114 N. C. 343, 19 S. E. 280; Klepper v. Cox, 97 Tenn. 534, 37 S. W. 284; Howard v. Walker, 92 Tenn. 452, 21 S. W. 897; First Nat. Bank v. Wilmington & W. R. Co., 23 C. C. A. 200, 77 Fed. 401; Bank v. Dowd, 38 Fed. 172; Bank v. Hubbell, 117 N. Y. 384, 22 N. E. 1031. Any agreement or course of dealing upon the part of a collecting bank, whereby it appears that the latter was at liberty to use the money collected as its own, and substitute its own obligation instead thereof, must necessarily destroy all features or elements of a trust in any particular case. Akin v. Jones, *supra*. There can be no doubt, we think, under the facts, but what it must have been understood by both of the banks that, when the note was collected, appellant was to receive a credit upon the proceeds collected; and that appellee, as the collecting bank, might use the money in its own business in like manner as it could funds deposited by its customers in the usual and ordinary course of business. Such deposits, we have seen, create nothing more than the relation of

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debtor and creditor. In the absence of a knowledge upon the part of the officers or agents of appellee bank of its being hopelessly insolvent at the time the note was received and collected, its right or power to mingle the proceeds of the note, when collected, as its own, with other funds of the bank, cannot be deemed to have been terminated, and no wrong, under the circumstances, can be imputed to the bank for its acts in collecting and remitting the money by the methods stated. Surely, unless it can be held, under the particular circumstances in this case, that it was wrongful for the Citizens' Bank to collect the note, and intermingle the proceeds with the funds of the bank as its own, appellant can have no preferential right over other creditors of the insolvent institution. Courts cannot recognize a mere claim or debt as a trust in order to give it a preference over other creditors of an insolvent person or corporation.

We have not considered the question presented by appellee to the effect that, if it were conceded that a trust was impressed in the first instance upon the funds arising out of the collection, such funds, however, were subsequently so dissipated by the bank that no part thereof can be traced to and identified in the hands of the receiver; hence an enforcement of the trust must fail. We conclude that, under the facts, the relation of trustee and *cestui que trust* was not created between the banks in question, but simply that of debtor and creditor; and therefore appellant is not entitled to be preferred in its claim over the rights of other creditors. The judgment is therefore affirmed.

NOTE.

Collections—Relation of Bank and Depositor.—In addition to the authorities cited in the opinion in the principal case as supporting the doctrine enunciated in the headnote, see *Reeves v. State Bank*, 8 Ohio St. 65; *Commercial Nat. Bank v. Armstrong*, 148 U. S. 50; *Levi v. National Bank*, 5 Dill. (U. S.) 104; *Hosmer v. Jewett*, 6 Ben. (U. S.) 208.

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McDONALD

v.

WILLIAMS *et al.**(Supreme Court of the United States, May 15, 1899.)*

Paying Dividends out of Capital—Right of Receiver to Recover.*—The receiver of a national bank cannot recover a dividend paid not at all out of profits, but entirely out of the capital, when the stockholder receiving such dividend acted in good faith, believing the same to be paid out of profits, and when the bank, at the time such dividend was declared and paid, was not insolvent.

HEARD on Certificate from the Circuit Court of Appeals for the Second Circuit.

This suit was commenced in the circuit court of the United States for the Southern district of New York.

Case Stated. It was brought by the plaintiff, as receiver of the Capital National Bank of Lincoln, Neb., for the purpose of recovering from the defendants, who were stockholders in the bank, the amount of certain dividends received by them before the appointment of a receiver.

Upon the trial of the case the circuit court decreed in favor of the plaintiff for the recovery of a certain amount. The defendants appealed from the decree because it was not in their favor, and the plaintiff appealed from it because the recovery provided for in the decree was not as much as he claimed to be entitled to. Upon the argument of the appeal in the circuit court of appeals certain questions of law were presented, as to which that court desired the instruction of this court for their proper decision.

It appears from the statement of facts made by the court that the bank suspended payment in January, 1893, in a condition of hopeless insolvency, the stock-

*See notes at end of case.

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holders, including the defendants, having been assessed to the full amount of their respective holdings ; but the money thus obtained, added to the amount realized from the assets, will not be sufficient, even if all dividends paid during the bank's existence were repaid to the receiver, to pay 75 per cent. of the claims of the bank's creditors.

This suit was brought to compel the repayment of certain dividends paid by the bank to the defendants on that part of the capital of the bank represented by their stock of the par value of \$5,000, on the ground, alleged in the bill, that each of said dividends was fraudulently declared and paid out of the capital of the bank, and not out of net profits.

A list of the dividends, and the amount thereof, paid by the bank from January, 1885, to July, 1892, both inclusive, is contained in the statement ; and it is added that all dividends, except the last (July 12, 1892), were paid to the defendant Williams, a stockholder to the amount of \$5,000, from the organization of the bank. The last dividend was paid to the defendant Dodd, who bought Williams' stock, and had the same transferred to his own name December 16, 1891.

When the dividend of January 6, 1889, was declared and paid, and when each subsequent dividend, down to and including July, 1891, was declared and paid, there were no net profits. The capital of the bank was impaired, and the dividends were paid out of the capital, but the bank was still solvent. When the dividends of January and July, 1892, were declared and paid, there were no net profits, the capital of the bank was lost, and the bank actually insolvent.

The defendants, neither of whom was an officer or director, were ignorant of the financial condition of the bank, and received the dividends in good faith, relying on the officers of the bank, and believing the dividends were coming out of the profits.

Upon these facts the court desired the instruction of this court for the proper decision of the following questions.

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First question : Can the receiver of a national bank recover a dividend paid not at all out of profits, but entirely out of the capital, when the stockholder receiving such dividend acted in good faith, believing the same to be paid out of profits, and when the bank, at the time such dividend was declared and paid, was not insolvent ?

Second question : Has a United States circuit court jurisdiction to entertain a bill in equity brought by a receiver of a national bank against stockholders to recover dividends which, as claimed, were improperly paid, when such suit is brought against two or more stockholders, and embraces two or more dividends, and when the objection that there is an adequate remedy at law is raised by the answer ?

Edward Winslow Paige, for appellant.

Theodore De Witt, for appellees.

MR. JUSTICE PECKHAM, after stating the facts, delivered the opinion of the court.

It will be noticed that the first question is based upon the facts that the bank, at the time the dividends were declared and paid, was solvent, and that the stockholders receiving the dividends acted in good faith, and believed that the same were paid out of the profits made by the bank.

The sections of the Revised Statutes which are applicable to the questions involved herein are set forth in the margin.*

*Sec. 5199. The directors of any association may, semi-annually, declare a dividend of so much of the net profits of the association as they shall judge expedient; but each association shall, before the declaration of a dividend, carry one-tenth part of its net profits of the preceding half year to its surplus fund until the same shall amount to twenty per centum of its capital stock.

Section 5204. No association, or any member thereof, shall, during the time it shall continue its banking operations, withdraw, or permit to be withdrawn, either in the form of dividends or otherwise, any portion of its capital. If losses have at any time been sustained by any such association, equal to or succeeding its undivided profits then on hand, no dividend shall be made; and no dividend shall ever be made by any association, while it continues its banking operations, to an amount greater than its net profits

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The complainant bases his right to recover in this suit upon the theory that the capital of the corporation was a trust fund for the payment of creditors entitled to a portion thereof, and, having been paid in the way of dividends to the shareholders, that portion can be recovered back in an action of this kind for the purpose of paying the debts of the corporation. He also bases his right to recover upon the terms of section 5204 of the Revised Statutes.

We think the theory of a trust fund has no application to a case of this kind. When a corporation is solvent, the theory that its capital is a trust fund upon which there is any lien for the payment of its debts has in fact very little foundation. No general creditor has any lien upon the fund under such circumstances, and the right of the corporation to deal with its property is absolute, so long as it does not violate its charter or the law applicable to such corporation.

In *Graham v. Railroad Co.*, 102 U. S. 148, 161, it was said by MR. JUSTICE BRADLEY, in the course of his opinion, that: "When a corporation becomes

then on hand, deducting therefrom its losses and bad debts. All debts due to any associations, on which interest is past due and unpaid for a period of six months, unless the same are well secured, and in process of collection, shall be considered bad debts within the meaning of this section. But nothing in this section shall prevent the reduction of the capital stock of the association under section fifty-one hundred and forty-three.

Sec. 5205 [as amended by section 4 of the act approved June 30, 1876; 19 St. 63]. Every association which shall have failed to pay up its capital stock, as required by law, and every association whose capital stock shall have become impaired by losses or otherwise, shall, within three months after receiving notice thereof from the comptroller of the currency, pay the deficiency in the capital stock, by assessment upon the shareholders *pro rata* for the amount of capital stock held by each; and the treasurer of the United States shall withhold the interest upon all bonds held by him in trust for any such association, upon notification from the comptroller of the currency, until otherwise notified by him. If any such association shall fail to pay up its capital stock, and shall refuse to go into liquidation, as provided by law, for three months after receiving notice from the comptroller, a receiver may be appointed to close up the business of the association, according to the provisions of section fifty-two hundred and thirty-four; and provided, that if any shareholder or shareholders of such bank shall neglect or refuse, after three months' notice, to pay the assessment, as provided in

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insolvent, it is so far civilly dead that its property may be administered as a trust fund for the benefit of its stockholders and creditors. And a court of equity, at the instance of the proper parties, will then make those funds trust funds which in other circumstances are as much the absolute property of the corporation as any man's property is his."

And in *Hollins v. Iron Co.*, 150 U. S. 371, 383, 14 Sup. Ct. 127, it was stated by MR. JUSTICE BREWER, in delivering the opinion of the court, and speaking of the theory of the capital of a corporation being a trust fund, as follows:

"In other words,—and that is the idea which underlies all these expressions in reference to 'trust' in connection with the property of a corporation,—the corporation is an entity, distinct from its stockholders as from its creditors. Solvent, it holds its property as any individual holds his,—free from the touch of a creditor who has acquired no lien; free also from the touch of a stockholder who, though equitably interested in, has no legal right to, the property. · Becoming insolvent, the equitable interest of the stockholders in

this section, it shall be the duty of the board of directors to cause a sufficient amount of the capital stock of such shareholder or shareholders to be sold at public auction (after thirty days' notice shall be given by posting such notice of sale in the office of the bank, and by publishing such notice in a newspaper of the city or town in which the bank is located, or in a newspaper published nearest thereto,) to make good the deficiency, and the balance, if any, shall be returned to such delinquent shareholder or shareholders.

Sec. 5140. At least fifty per centum of the capital stock of every association shall be paid in before it shall be authorized to commence business; and the remainder of the capital stock of such association shall be paid in installments of at least ten per centum each, on the whole amount of the capital, as frequently as one installment at the end of each succeeding month from the time it shall be authorized by the comptroller of the currency to commence business; and the payment of each installment shall be certified to the comptroller, under oath, by the president or cashier of the association.

Sec. 5141. Whenever any shareholder, or his assignee, fails to pay any installment on the stock when the same is required by the preceding section to be paid, the directors of such association may sell the stock of such delinquent shareholder at public auction, having given three weeks' previous notice thereof in a newspaper published and of general circulation in the city or county where the

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the property, together with their conditional liability to the creditors, places the property in a condition of a trust, first for the creditors, and then for the stockholders. Whatever of trust there is arises from the peculiar and diverse equitable rights of the stockholders, as against the corporation, in its property, and their conditional liability to its creditors. It is rather a trust in the administration of the assets after possession by a court of equity, than a trust attaching to the property, as such, for the direct benefit of either creditor or stockholder."

And also :

"The officers of a corporation act in a fiduciary capacity in respect to its property in their hands, and may be called to an account for fraud, or sometimes even mere mismanagement in respect thereto ; but, as between itself and its creditors, the corporation is simply a debtor, and does not hold its property in trust, or subject to a lien in their favor, in any other sense than does an individual debtor. That is certainly the general rule, and, if there be any exceptions thereto, they are not presented by any of the facts in this case.

association is located, or if no newspaper is published in said city or county, then in a newspaper published nearest thereto, to any person who will pay the highest price therefor, to be not less than the amount due thereon, with the expenses of advertisement and sale ; and the excess, if any, shall be paid to the delinquent shareholder. If no bidder can be found who will pay for such stock the amount due thereon to the association, and the cost of advertisement and sale, the amount previously paid shall be forfeited to the association, and such stock shall be sold as the directors may order, within six months from the time of such forfeiture, and if not sold it shall be canceled and deducted from the capital stock of the association. If any such cancellation and reduction shall reduce the capital of the association below the minimum of capital required by law, the capital stock shall, within thirty days from the date of such cancellation, be increased to the required amount ; in default of which a receiver may be appointed, according to the provisions of section fifty-two hundred and thirty-four, to close up the business of the association.

Sec. 5151. The shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount vested in such shares. [The balance of this section is immaterial.]

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Neither the insolvency of the corporation, nor the execution of an illegal trust deed, nor the failure to collect in full all stock subscriptions, nor all together, gave to these simple-contract creditors any lien upon the property of the corporation, nor charged any direct trust thereon."

Other cases are cited in the opinion as holding the same doctrine.

In *Railway Co. v. Ham*, 114 U. S. 587, 594, 5 Sup. Ct. 1081, MR. JUSTICE GRAY, in delivering the opinion of the court, said :

"The property of a corporation is doubtless a trust fund for the payment of its debts, in the sense that when the corporation is lawfully dissolved, and all its business wound up, or when it is insolvent, all its creditors are entitled, in equity, to have their debts paid out of the corporate property before any distribution thereof among the stockholders. It is also true, in the case of a corporation as in that of a natural person, that any conveyance of property of the debtor, without authority of law, and in fraud of existing creditors, is void as against them."

These cases, while not involving precisely the same question now before us, show there is no well-defined lien of creditors upon the capital of a corporation while the latter is a solvent and going concern, so as to permit creditors to question at the time the disposition of the property.

The bank, being solvent, although it paid its dividends out of capital, did not pay them out of a trust fund. Upon the subsequent insolvency of the bank and the appointment of a receiver, an action could not be brought by the latter to recover the dividends thus paid, on the theory that they were paid from a trust fund, and therefore were liable to be recovered back.

It is contended on the part of the complainant, however, that, if the assets of the bank are impressed with a trust in favor of its creditors when it is insolvent, they must be impressed with the same trust when it is solvent; that the mere fact that the value of the

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assets of the corporation has sunk below the amount of its debts, although as yet unknown to anybody, cannot possibly make a new contract between the corporation and its creditors. In case of insolvency, however, the recovery of the money paid in the ordinary way without condition is allowed, not on the ground of contract to repay, but because the money thus paid was in equity the money of the creditor; that it did not belong to the bank, and the bank, in paying, could bestow no title in the money it paid to one who did not receive it *bona fide* and for value. The assets of the bank while it is solvent may clearly not be impressed with a trust in favor of creditors, and yet that trust may be created by the very fact of the insolvency, and the trust enforced by a receiver as the representative of all the creditors. But we do not wish to be understood as deciding that the doctrine of a trust fund does in truth extend to a shareholder receiving a dividend, in good faith believing it is paid out of profits, even though the bank at the time of the payment be in fact insolvent. That question is not herein presented to us, and we express no opinion in regard to it. We only say that, if such a dividend be recoverable, it would be on the principle of a trust fund.

Insolvency is a most important and material fact, not only with individuals but with corporations; and with the latter, as with the former, the mere fact of its existence may change radically and materially its rights and obligations. Where there is no statute providing what particular act shall be evidence of insolvency or bankruptcy, it may be, and it sometimes is, quite difficult to determine the fact of its existence at any particular period of time. Although no trust exists while the corporation is solvent, the fact which creates the trust is the insolvency, and, when that fact is established, at that instant the trust arises. To prove the instant of creation may be almost impossible, and yet its existence at some time may very easily be proved. What the precise nature and extent of the trust is, even in such

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case, may be somewhat difficult to accurately define, but it may be admitted, in some form, and to some extent, to exist in a case of insolvency.

Hence it must be admitted that the law does create a distinction between solvency and insolvency, and that from the moment when the latter condition is established the legality of acts thereafter performed will be decided by very different principles than in a case of solvency. And so of acts committed in contemplation of insolvency. The fact of insolvency must be proved, in order to show the act was one committed in contemplation thereof.

Without reference to the statute, therefore, we think the right to recover the dividend paid while the bank was solvent would not exist.

But it is urged on the part of the complainant that section 5204 of the Revised Statutes makes the payment of a dividend out of capital illegal and *ultra vires* of the corporation, and that money thus paid remains the property of the corporation, and can be followed into the hands of any volunteer.

The section provides that "no association, or any member thereof, shall, during the time it shall continue its banking operations, withdraw, or permit to be withdrawn, either in the form of dividends or otherwise, any portion of its capital." What is meant by this language? Has a shareholder withdrawn or permitted to be withdrawn, in the form of a dividend, any portion of the capital of the bank, when he has simply and in good faith received a dividend declared by a board of directors of which he was not a member, and which dividend he honestly supposed was declared only out of profits? Does he, in such case, within the meaning of the statute, withdraw or permit to be withdrawn a portion of the capital? The law prohibits the making of a dividend by a national bank from its capital, or to an amount greater than its net profits then on hand, deducting therefrom its losses and bad debts. The fact of the declaration of a dividend is, in effect, the assertion by the board of directors that the dividend is

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made out of profits. Believing that the dividend is thus made, the shareholder, in good faith, receives his portion of it. Can it be said that in thus doing he withdraws, or permits to be withdrawn, any portion of the capital of the corporation? We think he does not withdraw it by the mere reception of his proportionate part of the dividend. The withdrawal was initiated by the declaration of the dividend by the board of directors, and was consummated on their part when they permitted payment to be made in accordance with the declaration. We think this language implies some positive or affirmative act on the part of the shareholder by which he knowingly withdraws the capital or some portion thereof, or with knowledge permits some act which results in the withdrawal, and which might not have been so withdrawn without his action. The permitting to be withdrawn cannot be founded upon the simple receipt of a dividend under the facts stated above.

One is not usually said to permit an act which he is wholly ignorant of; nor would he be said to consent to an act, of the commission of which he had no knowledge. Ought it to be said that he withdraws or permits the withdrawal by ignorantly, yet in entire good faith, receiving his proportionate part of the dividend? Is each shareholder an absolute insurer that dividends are paid out of profits? Must he employ experts to examine the books of the bank previous to receiving each dividend? Few shareholders could make such examination themselves. The shareholder takes the fact that a dividend has been declared as an assurance that it was declared out of profits and not out of capital, because he knows that the statute prohibits any declaration of a dividend out of capital. Knowing that a dividend from capital would be illegal, he would receive the dividend as an assurance that the bank was in a prosperous condition and with unimpaired capital. Under such circumstances, we cannot think that congress intended, by the use of the expression, "withdraw or permit to be withdrawn, either in the form of dividends, or otherwise," any portion of its capital, to

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include the case of the passive receipt of a dividend by a shareholder in the *bona fide* belief that the dividend was paid out of profits, while the bank was in fact solvent. We think it would be an improper construction of the language of the statute to hold that it covers such a case.

We are strengthened in our views as to the proper construction of this act by reference to some of its other sections. The payment of the capital within a certain time is provided for by sections 5140 and 5141. Section 5151 provides for the individual responsibility of each shareholder to the extent of his stock at the par value thereof, in addition to the amount invested therein. (These shareholders have already been assessed under this section.) And section 5205 provides for the case of a corporation whose capital shall have become impaired by losses or otherwise, and proceedings may be taken by the association against the shareholders for the payment of the deficiency in the capital within three months after receiving notice thereof from the comptroller. These various provisions of the statute impose a very severe liability upon the part of holders of national bank stock, and, while such provisions are evidently imposed for the purpose of securing reasonable safety to those who deal with the banks, we may nevertheless say, in view of this whole system of liability, that it is unnecessary, and that it would be an unnatural construction of the language of section 5204, to hold that, in a case such as this, a shareholder, by the receipt of a dividend from a solvent bank, had withdrawn, or permitted to be withdrawn, any portion of its capital.

We may concede that the directors who declared the dividend under such circumstances violated the law, and that their act was therefore illegal; but the reception of the dividend by the shareholder in good faith, as mentioned in the question, was not a wrongful or designedly improper act. Hence the liability of the shareholder should not be enlarged by reason of the conduct of the directors. They may have rendered

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themselves liable to prosecution, but the liability of the shareholder is different in such a case; and the receipt of a dividend under the circumstances is different from an act which may be said to be generally illegal, such as the purchase of stock in one national bank by another national bank for an investment merely, which is never proper. *Bank v. Hawkins* (just decided), 19 Sup. Ct. 739.

The declaration and payment of a dividend is part of the course of business of these corporations. It is the thing for which they are established, and its payment is looked for as the appropriate result of the business which has been done. The presumption of legality attaches to its declaration and payment, because declaring it is to assert that it is payable out of the profits. As the statute has provided a remedy, under section 5205, for the impairment of the capital, which includes the case of an impairment produced by the payment of a dividend, we think the payment and receipt of a dividend, under the circumstances detailed in the question certified, do not permit of its recovery back by a receiver appointed upon the subsequent insolvency of the bank.

The facts in the various English cases cited by counsel for complainant are so entirely unlike those which exist in this case that no useful purpose would be subserved by a reference to them. Not one holds that a dividend declared under such facts as this case assumes can be recovered back in such an action as this.

We answer the first question in the negative.

The second question relates to the jurisdiction of a court of equity over an action of this nature. It is evident that the question was propounded to meet the case of an affirmative answer to the first question.

In that event the second would require an answer. As we answer the first question in the negative, and the second question was scarcely touched upon in the argument, we think it unnecessary to answer it in

Notes

order to enable the court below to proceed to judgment in the case. The first question will be certified in the negative.

NOTES.

Dividends—Rights of Corporate Creditors.—Where dividends are illegally paid from the capital, or when there has been a fraudulent distribution of corporate property before the payment of debts, a court of equity will, at the instance of defrauded corporate creditors, follow the fund into the hands of the stockholders and require its application to the payment of those debts. *Wood v. Dummer*, 3 Mason (U. S.) 308; *Curran v. Arkansas*, 15 How. (U. S.) 304; *Main v. Mills*, 6 Biss. (U. S.) 98; *St. Mary's Bank v. St. John*, 25 Ala. 566; *Gratz v. Redd*, 4 B. Mon. (Ky.) 178; *Dudley v. Price*, 10 B. Mon. (Ky.) 84; *Brewer v. Michigan Salt Assoc.*, 58 Mich. 351; *Heman v. Britton*, 88 Mo. 549; *Williams v. Boice*, 38 N. J. Eq. 364, 6 Am. & Eng. Corp. Cas. 361; *Bartlett v. Drew*, 57 N. Y. 587; *Hastings v. Drew*, 76 N. Y. 9; *Sagory v. Dubois*, 3 Sandf. Ch. (N. Y.) 466; *Osgood v. Laytin*, 48 Barb. (N. Y.) 463; *Adler v. Milwaukee Patent Brick Mfg. Co.*, 13 Wis. 63.

In *Grant v. Southern Contract Co. et al.* (Ky.), 9 Am. & Eng. Corp. Cas., N. S., 682, it was held that where a contract company distributed among its stockholders the full amount of its capital stock, and entire assets, to the detriment of its creditors, the stockholders, in actions by the creditors, may be compelled to refund, whether the company, at the time of the distribution, was solvent or insolvent, and the fact that the distribution was called a "dividend" is immaterial.

Same—Stock Dividends.—And where the dividend, instead of being declared and payable in cash, is by issue of stock, where the corporation has no profits on which to base such an issue, its creditors may compel the holders to pay for such stock in a sequestration proceeding under Gen. Stat. Minn. 1878, c. 76. *Hospes v. Northwestern Mfg., etc., Co.*, 48 Minn. 174, 31 Am. St. Rep. 637.

Statutory Liability of Directors Does Not Exonerate Stockholder.—An express statutory provision holding the directors of a corporation personally responsible for dividends paid out of the capital instead of the profits does not relieve the stockholder of his common-law liability to repay such dividends for the benefit of the creditors of the corporation. *Williams v. Boice*, 38 N. J. Eq. 364, 6 Am. & Eng. Corp. Cas. 361.

When Not from Capital—Capital Stock Not a Liability.—Under section 1072 of the Code of *Iowa* the payment of dividends which leaves insufficient funds to meet the liabilities of the corporation is such fraud that the dividends or their equivalent in the hands of individual stockholders may be recovered by creditors. The statute, however, is not violated by the payment of dividends when the cash on hand is not sufficient to meet liabilities, if the entire resources of the corporation are sufficient for that purpose, "Liability" means an indebtedness the payment of which can be enforced, and hence does not include the capital stock. *Miller v. Bradish*, 69 Iowa 279.

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WATT

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FIRST NAT. BANK OF LAKE BENTON, MINN.

(*Supreme Court of Minnesota, June 9, 1899.*)

National Banks—Penalty for Usury.—Where a national bank has received a greater rate of interest than is allowed by law, the amount of recovery, under Rev. St. U. S. § 5198, by the party who has paid the same, is twice the amount of all the interest paid, and not merely double the excess over the legal rate.

(Syllabus by the Court.)

APPEAL by defendant from Lincoln county district court. *Affirmed.*

John McKenzie, for appellant.

F. L. Janes, for respondent.

MITCHELL, J. This action was brought under the national banking act (Rev. St. U. S. §§ 5197, 5198), which provides :

“Sec. 5197. Any association may take, receive, reserve and charge on any loan or discount made, or upon any note, bill of exchange or other evidences of debt, interest at the rate allowed by the laws of the state, territory or district where the bank is located, and no more.

“Sec. 5198. The taking, receiving, reserving or charging a rate of interest greater than is allowed by the preceding section, when knowingly done, shall be deemed a forfeiture of the entire interest which the note, bill or other evidence of debt carries with it or which has been agreed to be paid thereon. In case the greater rate of interest has been paid, the person by whom it has been paid, or his legal representatives, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus

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paid from the association taking or receiving the same."

The principal question in the case is whether the amount which may be thus recovered back is twice the entire interest paid, or merely double the excess of the interest over the legal rate. We are not aware that this question has ever been passed upon by the supreme court of the United States, but it has been almost uniformly held by the United States circuit courts and by the state courts that the amount of the recovery is twice the entire interest paid, and not merely double the excess paid over the legal interest. 16 Am. & Eng. Enc. Law, 176, and cases cited. This seems to us to be clearly the correct construction of the statute. It would be extraordinary if congress intended to provide for a forfeiture of all interest when no usury had been paid, but only allow a recovery of double the excess over legal interest when the interest had been paid. The word "rate" is evidently used in the same sense in both clauses of section 5198. "Greater rate," in the second clause, is the same as "a rate greater" in the first clause, and "the amount of interest thus paid" in the second, is the same as "the entire interest" in the first. The entire interest forfeited is just the rate which was contracted for. Upon payment of "a greater rate" than is lawful, "twice the amount of the interest thus paid" is twice the entire interest. To say that only a part of the greater rate (that is, the excess over the lawful rate) is the amount which can be recovered back would be to do violence to the plain language of the statute. *Hill v. Bank*, 15 Fed. 432; *Bank v. Karmany*, 98 Pa. St. 65; *Louisville Trust Co. v. Kentucky Nat. Bank*, 87 Fed. 143. The only authorities we have found to the contrary are *Hintermister v. Bank*, 64 N. Y. 212 (decided, "with hesitation," largely upon the supposed authority of *Brown v. Bank*, 72 Pa. St. 209), and *Bobo v. Bank*, 92 Tenn. 444, 21 S. W. 888, which follows the *Hintermister Case*. *Brown v. Bank*, *supra*, is not in point, the syllabus being misleading. In view of

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the decision of the same court in *Bank v. Karmany*, *supra*, without even mentioning the *Brown Case*, it would seem that the court did not consider that the latter case decided what was assumed in the *Hintermister Case*.

2. There was no reversible or prejudicial error in admitting in evidence the letter from the defendant's cashier to the plaintiff. The only thing contained in it which had any bearing on the case, or could possibly have influenced the jury, was the cashier's statement that the amount due on the note was \$1,622. He had already testified to and admitted this on his cross-examination, to which there was no exception. Order affirmed.

BUCK, J., absent, took no part.

NOTE.

National Banks—Interest—Usury—Penalty.—The penalty provided by the national bank act for the taking of usurious interest is twice the amount of all the interest paid. *Schuyler Nat. Bank v. Bollong*, 28 Neb. 684, 45 N. W. 164; *First Nat. Bank v. Gumes*, 49 Kan. 219, 30 Pac. Rep. 474; *Barnet v. Muncie Nat. Bank*, 98 U. S. 555; *Lebanon Nat. Bank v. Karmany*, 98 Pa. St. 65; *Merchants', etc., Nat. Bank v. Meyers*, 74 N. Car. 514; *Wiley v. Starbuck*, 44 Ind. 298. See, *contra*, *Bobo v. People's Nat. Bank*, 94 Tenn. 444.

SELOVER

v.

FIRST NAT. BANK OF MINNEAPOLIS.

(*Supreme Court of Minnesota, June 26, 1899.*)

Admission of Evidence—Harmless Error.—Conceding, without deciding, that certain evidence introduced is incompetent, and that it was error to admit it, it was error without prejudice, because the fact sought to be proved by it was conclusively proved by other evidence.

Loan Procured by Fraud—Extending Credit—Correspondent Banks—Estoppel.—M. fraudulently, and by means of false pretenses, procured a loan from the defendant bank, and requested it to credit

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the amount to its correspondent bank for his benefit. This defendant did, by notifying the correspondent bank accordingly. Thereupon the latter bank credited the amount on the antecedent debt of M. *Held*, defendant was not by reason thereof estopped, as against the latter bank, from rescinding the loan, and canceling the credit so extended to the latter bank for the benefit of M.

(Syllabus by the Court.)

APPEAL by plaintiff from Hennepin county district court. *Affirmed*.

Robert Jamison and Douglas A. Fiske, for appellant.

Gilfillan, Willard & Willard, for respondent.

CANTY, J. During all the time hereinafter stated, prior to February 25, 1895, the defendant, the First National Bank of Minneapolis, Minn., was a correspondent of the Merchants' Bank of Lake City,

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Minn., and one Holmes was the president of the latter bank. On February 15, 1895, Holmes borrowed of the defendant bank the sum of \$4,000, for which sum he then executed his note to that bank, and, as collateral security for the loan, assigned and delivered to that bank 50 shares of the capital stock of the Merchants' Bank, of which stock he was then the owner. Each bank kept an open account with the other, and Holmes directed the defendant bank to credit the account of the Merchants' Bank with the proceeds of the loan, amounting to \$3,940. Thereupon, on the same day, the defendant bank wrote the Merchants' Bank as follows: "We credit your account \$3,940, proceeds W. F. Holmes note." Ten days thereafter, on February 25th, the attorney general commenced an action to forfeit the charter of the Merchants' Bank on the ground that it had loaned to Holmes, directly and indirectly, over \$30,000,—a sum greatly in excess of 15 per cent. of the total amount of the capital stock of that bank. A receiver of the assets of the bank was thereupon appointed, and its doors were closed on that day. In the meantime the credit so given the Merchants' Bank by the defendant bank remained upon the books of both banks, and had

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not been drawn upon by the Merchants' Bank. On said February 25th the defendant bank notified both Holmes and the Merchants' Bank that defendant had rescinded the loan to Holmes, and canceled the credit so given to the Merchants' Bank, and defendant then tendered back to Holmes the 50 shares of stock so delivered to it as collateral security. The receiver made no attempt to collect the amount of this credit from defendant, but thereafter, on March 1, 1898, he sold the claim to plaintiff for the sum of \$75; and plaintiff brought this action to recover the amount of the claim, to wit, the sum of \$3,940, and interest thereon. On the trial the court, sitting without a jury, found for defendant, and from an order denying a new trial plaintiff appeals. The defense that was interposed is that Holmes obtained the loan from the defendant bank by means of false and fraudulent representations; that at the time of negotiating the loan he represented that the stock so offered as collateral security was worth par, to wit, the sum of \$5,000, whereas in fact such stock was wholly worthless, which he then well knew, and made the representations with intent to deceive defendant, who believed the representations, and, relying on them, was induced thereby to make the loan. To avoid the effect of this defense, the plaintiff claims that, on the faith of the credit so given by defendant to the Merchants' Bank, it gave credit to Holmes, canceled a check which it held against him, and put itself in a worse position than it would have been in if such credit had not been given to him as a result of such loan; that, therefore, defendant is estopped, as against the Merchants' Bank and this plaintiff, from setting up such defense. The evidence amply warranted the court in finding that the representations were made with the intent aforesaid; that defendant relied on them, and was by them induced to make the loan. The only evidence tending to show that the stock was worthless on February 15, 1895, was that the Merchants' Bank was insolvent on February 25, 1895, and that its affairs were in sub-

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stantially the same condition on the former date as on the latter.

1. Appellant assigns as error the admission of certain evidence introduced for the purpose of showing such insolvency. The court permitted evidence to be introduced of the testimony of Moore, the receiver, given by him on the trial of another action between other parties, in which he stated the total amount of the assets of the defunct bank, and the total amount of its liabilities, when he took possession. Admissions of Moore to the vice president of defendant to the effect that its repudiation of the claim was just were also received in evidence. After the action was commenced by the attorney general, a creditor of the Merchants' Bank intervened in that action, and filed a complaint to enforce the stockholders' superadded liability. It is alleged in that complaint that the Merchants' Bank was insolvent on February 25th. This plaintiff, who is an attorney at law, signed that complaint as the attorney of the intervening creditor. We do not deem it necessary to pass on the admissibility of any of this evidence. There is other evidence in the case which tends to prove that the Merchants' Bank was insolvent at the time aforesaid, and plaintiff did not offer a particle of evidence to rebut the same, or to prove that the bank was not insolvent at such time. Therefore the evidence is conclusive that it was then insolvent, and, if it was error to admit the evidence objected to, it was error without prejudice. It appears by the report of sale made by the receiver, offered in evidence by the plaintiff, that the greater portion of the assets of the defunct bank was sold at public auction at a very small price. Among the assets so sold were several promissory notes made by Holmes, which sold for about \$1 for every \$1,000 thereof. Plaintiff made in said intervention proceedings an affidavit for the purpose of having additional parties brought in, and it is stated in the affidavit that certain stockholders are liable for certain amounts on their superadded liability.

Admission of
Evidence—
Harmless Error.

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On the trial, plaintiff stated that he made this statement on the assumption that ultimately the assets would not be sufficient to pay the debts. He then further testified: "Q. That the assets of the bank on hand on the 25th day of February were not sufficient to pay the liabilities of the bank on that day? A. Why, I think so. I was acting as attorney for one of the creditors, as sufficiently indicated in that paper." This evidence of the insolvency of the Merchants' Bank is corroborated in some slight degree by almost every line and page of testimony in the case, and is wholly uncontradicted.

2. In our opinion, the trial court did not err in holding that, on the faith of the credit given by defendant to the Merchants' Bank for the benefit of Holmes, the latter bank did not part with anything which can be urged here as the basis of any such an estoppel against defendant. For the purpose of making it appear that the indebtedness of Holmes to the Merchants' Bank was much less than it really was, the sum of \$13,127.87 of that indebtedness was, on the books of that bank, charged to the First National Bank of Casselton, N. D. There never was any foundation for any such charge, and the latter bank was at that time indebted to the former in the sum of \$27.80, and no more. Besides this fictitious charge against the Casselton bank, and the Merchants' Bank kept in its drawer a check drawn by Holmes on the former bank in favor of the latter bank for the sum of \$4,000. This check was never entered on the books of the latter bank, and was never presented for payment to the former bank, who knew nothing about the existence of this check, or of the false charge on the books of the latter bank. This was the condition of things February 15, 1895, when defendant informed the Merchants' Bank that it had been credited with the \$3,940 for the benefit of Holmes. Thereupon, on the faith of this, the Merchants' Bank credited Holmes' account with \$4,000, credited the fictitious account against the

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Casselton bank with the same amount, and surrendered to Holmes the check aforesaid ; he having at the same time given the Merchants' Bank a new check for \$60. In our opinion, the trial court was warranted in finding, and we may assume that it did find, that the \$4,000 check so kept in the drawer was given by Holmes, and held by the Merchants' Bank, merely for the purpose of keeping up false appearances, and was a part of the same scheme in pursuance of which it made the false charges in its books. Neither plaintiff nor the Merchants' Bank can predicate any estoppel on the fact that such bank used the credit thus extended as a pretext for taking down some of these false colors. But the fact still remains that, by reason of the giving of such credit by defendant to the Merchants' Bank, the latter was induced to give Holmes credit to the amount of \$3,940 on his antecedent indebtedness to the latter bank. In our opinion, this alone will not constitute a sufficient ground for such an estoppel. According to the weight of authority, it is sufficient to protect the indorser of negotiable paper, taken in good faith before maturity, that the same was taken in payment of or as security for an antecedent debt. *Rosemond v. Graham*, 54 Minn. 323, 56 N. W. 38 ; 4 Am. & Eng. Enc. Law (2d Ed.) 285. But the Merchants' Bank was not protected by any such doctrine of negotiability, and neither is plaintiff. As against either of these, the payment of the antecedent debt of Holmes to the latter bank is not sufficient to shield it or plaintiff from the defendant's defense ; but, as against either of these, the defendant is entitled to make any defense which it could have made against Holmes himself. This disposes of all the questions raised having any merit. Order affirmed.

MITCHELL, J., absent.

Merchants' Nat. Bank of Rome v. Fouché

MERCHANTS' NAT. BANK OF ROME

v.

FOUCHE.

(*Supreme Court of Georgia, July 28, 1898.*)

National Banks — Impairment of Stock — Assessment — Sale of Stock.—A sale of all the shares of stock held by a shareholder in a national bank when such sale is made, under the provisions of and for the purpose set forth in section 5205, Rev. St. U. S., as amended by Act June 30, 1876, is void, unless at such sale the stock brings a price equal in amount to the assessment placed thereon under the provisions of that section.

(Syllabus by the Court.)

ERROR by defendant from Floyd county city court.
Reversed.

C. N. Featherston, for plaintiff in error.

Fouché & Fouché, for defendant in error.

FISH, J. The capital stock of the Merchants' National Bank of Rome became impaired 25 per cent., and, in pursuance of the provisions of section 5205, Rev. St. U. S., an assessment of 25 per cent. was levied upon the shareholders, *pro rata*, to make good such impairment. One of the shareholders neglected or refused to pay his *pro rata* of this assessment, and all of his stock was offered for sale and bid off by the plaintiff (defendant in error), at the price of \$10.90 per share, at public auction had in conformity with the statute. The officers of the bank refused to deliver the stock to the plaintiff, upon the tender of the amount of his bid, whereupon he sued the bank for the difference between the real value of the stock at the date of sale and the sum at which it was knocked off to him. A demurrer was filed to the petition, the main ground of which was that the petition showed the sale to be void because the amount of the bid was less than the

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amount of the assessment. The demurrer was overruled, and the defendant excepted. Section 5205, Rev. St. U. S., prescribes that "every association whose capital stock shall have become impaired by losses or otherwise, shall, within three months after receiving notice thereof from the comptroller of the currency, pay the deficiency in the capital stock by an assessment upon the shareholders, *pro rata*, for the amount of capital stock held by each." Section 4, Act June 30, 1876 (Rev. St. U. S. § 5205), further provides "that if any shareholders of such bank shall neglect or refuse, after three months' notice, to pay the assessment as provided in this section, it shall be the duty of the board of directors to cause a sufficient amount of the capital stock of such shareholder or shareholders to be sold at public auction (after thirty days' notice shall be given by posting such notice of sale in the office of the bank, and by publishing such notice in a newspaper of the city or town in which the bank is located, or in the newspaper published nearest thereto), to make good the deficiency; and the balance, if any, shall be returned to such delinquent shareholder or shareholders." The question made is whether a sale under this law is valid, and can be enforced by the buyer, when the price at which the stock is bid off is less than the amount of the assessment. The intention of the national banking act is that the capital stock of national banks shall not be worth less than par. And to this end it is provided, by the statute above quoted, that if, by losses or otherwise, the stock of any such bank shall become impaired, then, within three months after receiving notice thereof from the comptroller of the currency, the bank shall pay the deficiency in the capital stock by an assessment upon the shareholders, *pro rata*, for the amount of capital stock held by each; and if any shareholder shall neglect or refuse, after three months' notice, to pay his *pro rata* assessment, then the board of directors shall cause a sufficient amount of the stock of such shareholder to be sold at public auction, after proper advertisement, to make good the

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deficiency. The law contemplates that the burden of restoring an impaired capital shall rest equally on all the shareholders. If some pay their *pro rata* in full, and the purchasers of the stock of delinquents pay less, then such purchasers hold stock in a corporation on better terms than those who paid in full; and, again, a portion of the impairment, which it was the only object of the assessment to make good, remains, and the evident purpose of the law is thus defeated. Moreover, the statute imperatively states that a sufficient amount of the delinquent's stock shall be sold to make good the deficiency, and the balance, if any, returned to such delinquent shareholder. The law here provides for the disposition of the "surplus" arising from the sale, provided the stock sells for more than the assessment, but, of course, could not entertain the possibility of a deficiency in view of the plain provision that a sufficient amount of the stock must be sold to make good the deficiency. The law, in effect, makes the amount due by each delinquent shareholder, under the assessment on his stock, "an upset price," which it must bring, when sold under the provisions of the statute, and this bidders are presumed to know. We are of opinion, therefore, that as the bid for the stock, in this instance, did not equal the amount of the assessment for the payment of which the stock was offered for sale, there was no legal sale, and the intended purchaser acquired no right or title to the stock upon tendering the amount of his bid. The construction which we have placed upon the statute is the same as that which it has received from the comptroller of the currency under the present and the last preceding administration at Washington. The court below erred in overruling the demurrer. Judgment reversed.

Com. to Use of Com. Title, etc., Co. v. Chestnut St. Nat. Bank

COMMONWEALTH, TO USE OF COMMONWEALTH
TITLE INSURANCE & TRUST CO.

v.

CHESTNUT ST. NAT. BANK *et al.*

(*Supreme Court of Pennsylvania, Jan. 30, 1899.*)

National Banks as Garnishees.—Section 5242 of the Revised Statutes of the United States, providing, in substance, that no attachment shall issue against a national bank or its property before final judgment in any proceeding in any state court, etc., is not applicable to an attachment against an individual, with a clause of *scire facias* to warn the bank to show cause why judgment should not be levied of such individual's property in the possession of the bank.

APPEAL by garnishees from Philadelphia county court of common pleas. *Affirmed.*

The opinion of the trial court was as follows :

“Judgment was entered against the defendant, James Long, on September 29, 1897, for \$31,499 ; and on October 5, 1897, an attachment *sur* judgment was issued and served on the Chestnut Street National Bank as garnishee. To interrogatories the bank answered : That Long was indebted to it in the sum of \$17,831, with interest from April 22, 1897. That on September 20, 1897, it issued a bill for \$2,900, payable only through the clearing house the day after issue, and delivered same to Long, he having closed his account with the bank. The duebill was not paid through the clearing house, but on November 3, 1897, which was nearly a month after the service of the attachment, Long surrendered the duebill to the bank, to pay interest due on his indebtedness above mentioned, which interest was deducted, and the bank issued a new certificate, dated November 3, 1897, for \$2,444.33, and delivered it to Long. This duebill was passed through the clearing house and paid. The

Com. to Use of Com. Title, etc., Co. *v.* Chestnut St. Nat. Bank

bank answered further that, when the writ of attachment was served, it held, as collateral security for the indebtedness to it, seventy-seven shares of the National Gas Trust, of the value of \$160 per share, and thirty-three shares of the capital stock of the Eighth National Bank, of the value of \$264 per share. The Chestnut Street National Bank failed on December 23, 1897, and is now in the hands of a receiver, who has entered a rule to vacate and dismiss the attachment against that bank for want of jurisdiction in this court. In support of the rule the receiver relies upon section 5242 of the Revised Statutes of the United States, which is as follows: 'All transfers of the notes, bonds, bills of exchange, or other evidences of debt owing to any national banking association or of deposits to its credit, all assignments of mortgages, securities on real estate, or of judgments, or decrees in its favor: all deposits of money, bullion or other valuable thing for its use or for the use of any of its shareholders or creditors; and all payments of money to either made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one paper to another, except in payment of its circulating notes, shall be utterly null and void. No attachment, injunction, or execution shall be issued against such association or its property before final judgment in any suit, action, or proceeding in any state, county, or municipal court.'

"Were this attachment issued against the bank for a debt due by it, then the claim of the receiver to exemption from such attachment would be valid. But it is not for an indebtedness of the bank that an attachment was served on it. The attachment is for an indebtedness by Long, and the purpose of the attachment is not to obtain a judgment for a debt, due by the bank, but to inquire and determine whether it has any money or property of Long which is subject to an execution at the suit of his creditors. The purpose of

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the statute is to prevent one creditor of an insolvent national bank from obtaining a priority over others, and to preserve an equality between its creditors in the distribution of its assets. Therefore it is enacted that no attachment, injunction, or execution shall issue against such association or its property before judgment,—such, for instance, as a foreign attachment for a debt by it. The statute does not prevent suits against a national bank in a state court. All it means is that no liens shall be acquired before judgment by attachment, injunction, or execution before judgment. After judgment an execution may be issued against a national bank, the same as against any other defendant. But this is not a suit against the bank. It is a suit now in judgment against Long, and the attachment is an execution against him, with a clause of *scire facias* to warn the bank to show cause why judgment should not be levied of Long's property in the possession of the bank. The bank admits that when the attachment was served it owed Long \$2,900 on a clearing-house due bill, which was not paid in the usual course of such due bills; that Long presented the bill to the bank on November 8, 1897, and the bank paid it by giving Long credit for interest due by him, and giving him a new bill. This was a month after the attachment had been served upon the bank. The bank had no right to deal with Long as it did. The plaintiff was entitled to that money, and to a finding to that effect. Likewise, the plaintiff is entitled to a finding that the bank holds the above-mentioned shares of stock subject to its lien for the indebtedness of Long to it, and the plaintiff is entitled to execution against that stock, subject to the lien of the bank. As to the money, we incline to think that as the bank is now insolvent the plaintiff can recover no more than a dividend, and is not entitled to any priority over the other creditors of the bank. As to the stock, the plaintiff is entitled to a *fi. fa.* to sell that, subject to the claim of the bank. The foregoing reasoning has the support of a decision of the court of appeals of New York, which held that section 5242 of

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the Revised Statutes of the United States does not prohibit the issue of an attachment, injunction, or execution against an insolvent national bank for property of a third person in the custody of the bank. *Bank v. Blye*, 101 N. Y. 303, 4 N. E. 635. Rule discharged."

Asa W. Waters and *W. H. Addicks*, for appellants.
Alfred D. Wiler and *Crawford, Laughlin & Dallas*, for appellees.

PER CURIAM. The judgment is affirmed on the opinion of the learned president of the court below.

LONGFELLOW

v.

BARNARD.

(*Supreme Court of Nebraska, May 17, 1899.*)

Unincorporated Bank.—An unincorporated bank, exclusively owned by a private individual, is not a legal entity, even though its business be conducted by a president and cashier.

Same—Right to Dispose of Assets.—In such case the assets of the bank represent merely the portion of the owner's capital invested in banking, and he may lawfully dispose of them to pay or secure the just claims of any of his creditors.

Right of Fraudulent Vendee to Secure Creditor of Vendor.—A fraudulent vendee of property may lawfully mortgage the same to secure a *bona fide* creditor of the fraudulent vendor. The consent of the vendor to such disposition of the property is implied in the conveyance by which he invested the vendee with the title.

Same—Same—Mortgage—Consideration.—A pre-existing debt already due is a sufficient consideration for the execution of a mortgage securing the same.

Mortgage—Ignorance of Party Secured.—A mortgage given to indemnify a surety or guarantor is, in legal effect, a security to the owner of the debt, even though he did not originally rely on it, or know of its existence.

Same—Assignment to Secure Creditor of Fraudulent Mortgagor—Consideration.—An assignment of a fraudulent mortgage to secure a creditor of the mortgagor is valid without any consideration moving from the assignee to the assignor. Such a transaction is, in

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substance, a release of the fraudulent mortgage and the execution of a new mortgage by the debtor to his creditor.

Merger.—Whether a merger results from the possession by the same person at the same time of two estates of different rank in the same property depends generally on the intention of the owner.

Appointment of Receiver.—The appointment of a receiver is in the nature of an equitable execution. By it the court is able to reach only the actual interest of the debtor in the property impounded.

(Syllabus by the Court.)

APPEAL by defendant from Saunders county district court. *Reversed.*

Munger & Courtright, for appellant.

Good & Good, for appellee.

SULLIVAN, J. This action was instituted in the district court by the appellee against the appellant to cancel and annul a mortgage upon lot 7 and the west half of lot 8 in the County addition to the city of Wahoo. The defendant answered, asserting the validity of his mortgage, and demanding a foreclosure of the same. The decree granted the relief sought by the petition, and dismissed the counterclaim. Barnard brings the record here for review by appeal.

Most of the essential facts are either admitted or specifically found by the trial court. The lots were originally owned by W. H. Dickinson, and are covered by a large brick building, one room of which was used and occupied for some years prior to 1893 by the State Bank of Wahoo. The bank was not incorporated, but was a private institution, owned and managed by Dickinson, who was at the same time conducting a real-estate, loan, and insurance business. He was also interested in an electric light plant, and owned an elevator and coal yard. On January 24, 1893, Dickinson being insolvent, and having absconded, the bank closed its doors, and soon afterwards passed into the hands of a receiver appointed under the authority of section 14, c. 37, p. 397, Sess. Laws 1889. In November, 1892, Dickinson, for the purpose of defrauding his creditors, executed to his sister-in-law, Harriet E. Adams, the mortgage in suit; and about a month later he made a

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fraudulent conveyance to her of the legal title to the mortgaged property. The deed contained a recital to the effect that the grantee had assumed the payment of her own mortgage. Both instruments were filed for record at the same time. Prior to the events just recounted, Dickinson, in some transaction not connected with the banking business, became indebted to Barnard in the sum of \$2,000. This indebtedness was evidenced by a promissory note which Barnard had sold to the First National Bank of Fremont with a guaranty of payment at maturity. The note became due on January 1, 1893, and, being unpaid, Barnard went to Wahoo with a view of obtaining security or payment. He was unable to see Dickinson, but he obtained from Miss Adams, as protection to his guaranty, an assignment of her mortgage and the note which it was given to secure ; and he agreed, in consideration of receiving the collateral, to take up the note, which was still held by the Fremont bank, and carry it himself for some indeterminate time. The defendant did afterwards take up the note according to his agreement, and now seeks to obtain payment by foreclosure of the Adams mortgage. The receiver is in possession of the property. He holds the legal title, which was conveyed to him by Miss Adams in recognition of his superior right, and subject only to such incumbrances as the courts of this state might adjudge to be valid. The trial court found that Barnard knew, or ought to have known, that the conveyances by Dickinson to Adams were made for the purpose of defrauding creditors. This finding seems to be warranted by the evidence, and we shall, therefore, in the further consideration of the case, assume its correctness.

With this statement of the salient facts, we proceed to examine what we deem to be the decisive points discussed in the briefs of counsel. The validity of the mortgage in the hands of the defendant is the cardinal question which each of the parties, in demanding affirmative relief, presents for decision. The appellee insists that the

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Bank.

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State Bank of Wahoo was a *de facto* corporation, and that the mortgaged property, being a bank asset, was primarily liable for the payment of claims growing out of the bank business. We cannot accept this view, for it is obviously based on a false assumption. The business of the bank was conducted, it is true, by a president and cashier; but articles of incorporation were never adopted; it had no board of directors; it never pretended to possess or exercise corporate powers; it was incapable of contracting debts, or of owning and holding property. In its reports to the state banking board it was represented as a private concern, of which W. H. Dickinson was the sole proprietor. Certainly it was not in fact a legal entity, and we know of no reason why the owner, or those in privity with him, should be precluded from asserting the truth in regard to the matter. The assets of the bank represented merely the portion of Dickinson's capital invested in banking, and its liabilities represented the indebtedness incurred by Dickinson as a banker. The assets were his, and he might dispose of them as he pleased, subject, of course, to the power of creditors to reclaim them if the disposition should be in fraud of their rights. The liabilities were also his, and for their satisfaction all of his property not exempt by law was equally liable to seizure and sale. It results from these considerations that Barnard, before the appointment of the receiver, might have obtained from Dickinson security for the \$2,000 note in the form of a mortgage on the real estate in controversy; and he might also, with Dickinson's consent, take as security an assignment from Miss Adams of the mortgage in suit. Such a transaction would be, in substance, a restoration of the property to the owner, and the execution by him of a mortgage thereon to secure the just claim of a creditor. *Murphy v. Briggs*, 89 N. Y. 446. It would effectually purge the mortgage of the fraud with which it was originally tainted, and make it a valid and enforceable security. This proposition is amply sustained by

Same—Right to
Dispose of Assets.

Right of Fraudu-
lent Vendee to
Secure Creditor of
Vendor.

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authority. Bank v. Haskins, 3 Metc. 332 ; Crown-inshield v. Kittridge, 7 Metc. 520 ; Thomas v. Goodwin, 12 Mass. 140 ; Hutchins v. Sprague, 4 N. H. 469 ; Butler v. White, 25 Minn. 432 ; Brown v. Webb, 20 Ohio, 389 ; Dolan v. Van Demark, 35 Kan. 304, 10 Pac. 848. In the cases here cited the property conveyed to defraud creditors was afterwards, with consent or by the direction of the debtor, applied to the payment of his debts. They were cases in which he exercised, through the agency of the fraudulent transferee, his undoubted right to pay or secure some of his creditors to the prejudice of others. The case at bar is somewhat different, and we were at first inclined to think that Miss Adams had no implied power to make either the defendant or the Fremont bank a preferred creditor. But the judicial utterances, we find, are to the effect that she had. In Dolan v. Van Demark, *supra*, VALENTINE, J., delivering the opinion of the court, said : "While, generally, a fraudulent vendee cannot, as against the creditors of the fraudulent vendor, sell, assign, or transfer the property to a third person who has notice of the fraud, nor transfer or assign the same to even a person who has no such notice, where such transfer or assignment is merely to pay a pre-existing debt of the fraudulent vendee, yet such fraudulent vendee may make a valid sale of the property to a *bona fide* purchaser without notice of the fraud, or may, with the consent of the fraudulent vendor, and probably without his consent, make a valid transfer or assignment of such property to a creditor of the fraudulent vendor, either in payment or partial payment of a *bona fide* debt of the fraudulent vendor, or as security for such debt, and whether such creditor has notice or not of the prior fraudulent sale." In Webb v. Brown, 3 Ohio St. 246, which was a contest between creditors, it was distinctly held that the fraudulent vendee might, without authority from his vendor, prefer one of the latter's creditors. The court said : "A conveyance by a fraudulent vendee of goods in payment or security of the vendor's debt requires no

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other assent than that which is contained in the vesting of the vendee with all the vendor's right in the property." We accept this as a correct statement of the law, and accordingly hold that the assignment from Miss Adams was just as effectual as though it had been made with Dickinson's express consent.

But it is contended by the receiver that Miss Adams had no mortgage to assign; that it was merged in the legal estate, and ceased to exist, when she became the owner of the fee. Upon this point the trial court made no finding, but the evidence, we think, pretty conclusively shows that the mortgage was not extinguished. Whether a merger results from the possession by the same person at the same time of two estates of different rank in the same property, is generally a question of the owner's intention. *Mathews v. Jones*, 47 Neb. 616, 66 N. W. 622; *Lumber Co. v. Bourke*, 55 Neb. 9, 75 N. W. 241. Miss Adams agreed, in the deed from Dickinson, to pay this mortgage. She filed both instruments for record at the same time, and afterwards assigned the mortgage as security. These facts clearly evince an election by her to keep it alive. *Insurance Co. v. Corn*, 89 Ill. 170; *Kellogg v. Ames*, 41 N. Y. 259.

The receiver asserts that the assignment of the mortgage was void for want of a valuable consideration to support it. We do not think it was. The transaction, as we have already pointed out, was, in substance and legal effect, the execution by Dickinson to Barnard of a mortgage to secure the payment of the \$2,000 note. *Murphy v. Moore*, 23 Hun, 95; *Seymour v. Wilson*, 19 N. Y. 417. While it was primarily intended to indemnify Barnard against loss by reason of his guaranty, it was, as a matter of law, a security to which the First National Bank of Fremont might rightfully resort for the payment of its claim, even though it did not rely on it, or know of its existence. *Bank v. Stewart*, 56 Neb.—, 77 N. W. 370; *Seibert v. True*, 8 Kan. 52;

Merger.

Same—Same—
Mortgage—Con-
sideration.

Mortgage—Igno-
rance of Party
Secured.

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New Bedford Sav. Inst. v. Fairhaven Bank, 9 Allen, 175; Moses v. Murgatroyd, 1 Johns. Ch. 119. The existence of the debt and the guaranty of its payment made the assignment valid without any other consideration. The assignor was entitled to no consideration. She parted with nothing that was lawfully hers. She merely transferred Dickinson's property to pay Dickinson's debt. That a pre-existing debt, already due, is a sufficient consideration for the execution of a mortgage securing the same, is a doctrine well established by the decisions of this court. Turner v. Killian, 12 Neb. 580, 12 N. W. 101; Henry v. Vliet, 36 Neb. 138, 54 N. W. 122; Chaffee v. Lumber Co., 43 Neb. 224, 61 N. W. 637. And it is equally well settled that the liability of a principal debtor to his surety or guarantor is a valuable consideration for the execution to him of an indemnity mortgage. Bank v. Stewart, *supra*; Stevens v. Bell, 6 Mass. 342; Buffum v. Green, 5 N. H. 71; Williams v. Silliman, 74 Tex. 626, 12 S. W. 534; 6 Am. & Eng. Enc. Law (2d Ed.) 709. Had Dickinson himself made the mortgage to defendant, he certainly could not successfully resist foreclosure on the ground that there was no legal consideration. Neither can the plaintiff, acting as a representative of creditors. The appointment of the receiver was in the nature of an equitable execution. By it the court was able to reach only the actual interest of the debtor in the property,—the interest which the creditors themselves might have reached with an execution issued on a judgment at law in their favor. The judgment is reversed, and the cause remanded, with direction to the district court to render a decree foreclosing the defendant's mortgage as prayed.

Same—Assignment to Secure Creditor of Fraudulent Mortgagor—Consideration.

Appointment of Receiver.

Western Invest. Banking Co. v. Murray, County Treasurer

WESTERN INVESTMENT BANKING CO.

v.

MURRAY, COUNTY TREASURER.

(*Supreme Court of Arizona, March 15, 1899.*)

Banks—Taxation of Shares—Assessment.—The names of the shareholders, and the correct number of shares owned by each, were stated in a bank-stock assessment. *Held*, that the intent was not to tax the capital stock of the bank, but the shares of stock owned by the individual stockholders.

Same—Same—Same.—Under Act No. 51 of the Laws of 1897 of Arizona, providing for the taxation of the shares of all banking corporations, and making it the duty of the cashier or president of all banks to pay the taxes due upon the shares of stock, and protecting such officer in such payment by creating a lien against such shares of stock, while, properly, such shares should be listed and assessed in the names of the holders thereof, their assessment in the name of the bank is a mere irregularity, which will not warrant equitable interference.

Banking Associations—Definition.—It appeared that plaintiff was a corporation engaged in the business of receiving money, and investing it for its depositors, by loaning it in their names, and also of collecting rents, and interest due on such loans as it might make; that the interest and rents thus collected were subject to check by those for whom they were collected; and that it charged a commission on its loans to the borrowers, and also a commission on the collection of interest and rents made by it. *Held*, that plaintiff was engaged in the banking business, and was a banking association within the meaning of such statute and its shares of stock were, therefore, taxable.

Double Taxation—Construction of Statute.—Such statute, properly construed, does not provide for double taxation in the case of banking institutions, and under its provisions the shares of stock in such corporations are taxable, and not the corporate property.

APPEAL by plaintiff from Maricopa county district court. *Affirmed.*

J. B. Woodward, for appellant.

Baker & Bennett and *Thomas E. Flannigan*, *Dist. Atty.*, for appellee.

SLOAN, J. The Western Investment Banking Company brought suit in the court below against D.

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L. Murray, as treasurer and *ex officio* tax collector of Maricopa county, to obtain an injunction Case Stated. against the collection of a portion of its taxes assessed for the year 1897. The bank was assessed for the said year upon its real estate and personal property, valued at \$7,045.10. There was also placed upon the assessment roll for the same year, against the name of the bank, property described as: "Capital stock: J. Lutgerding, 1 share; P. L. Kay, 1 share; P. K. Hickey, 10 shares; S. P. Hoefer, 10 shares; M. J. Hickey, 150 shares,—value, \$9,125.00." The bank tendered to the said tax collector the taxes due on its real estate and personal property, but refused to pay the taxes assessed upon the above described property. The tax collector refused to accept from the bank any amount of its taxes less than the whole amount charged against it, and in due season advertised the bank's property for sale for the whole amount of the bank's taxes which had become delinquent; whereupon the bank brought this suit to restrain the sale. Judgment was entered by the court below denying to the appellant the relief prayed for, or any relief in the premises. From this judgment the bank has appealed.

A large number of assignments of error are set up in the brief of appellant, the more important of which we will consider without regard to the order in which they are set out in the brief. Concisely stated, these assignments are based upon the following propositions: First, that the assessment objected to is uncertain and insufficiently described, in that it does not appear therefrom whether the taxation of the capital stock, or the taxation of shares of stock, of the bank, is intended; second, that, if the shares of stock owned by the stockholders of the bank are intended to be taxed, then the same are illegally assessed in the name of the bank; third, that the appellant is not of the class of corporations, the shares of stock of which are subject to taxation; fourth, that the taxation of the real estate and

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personal property of the bank, and also of its shares of stock, is double taxation.

The questions here presented involve a construction of that exceedingly crude piece of legislation known as "Act No. 51 of the Laws of 1897." This act reads as follows :

"An act to amend an act entitled 'An act relating to assessment and collection of taxes,' approved April 13, 1893.

"Be it enacted by the legislative assembly of the territory of Arizona :

"Section 1. That Act No. 85 of the legislative assembly, approved April 13, 1893, be amended so as to read as follows : That all shares of stock of every national bank, or banking association, whether organized under the laws of this territory, or of any other state or territory, or any act of congress of the United States, and doing business in this territory shall be assessed and taxed in the county where such national bank, or banking association is located for the transaction of business ; provided that nothing herein shall be so construed as to tax the shareholders of such national banks and banking associations, at a greater rate than is assessed against other moneyed capital in the hands of individuals.

"Sec. 2. That all shares of stock of every corporation or association in this territory, other than incorporated banking associations that shall engage in the business of banking, in buying and selling exchange, and receiving deposits, shall be assessed and taxed in the county where such association or corporation is located and doing such business, provided, such shares shall not be at a greater rate than is assessed against other moneyed capital in the hands of individual citizens of the territory.

"Sec. 3. That every person, corporation or association, other than national banks, and corporations, and associations that do a banking business, on capital stock divided into, which is represented by shares, who shall engage in the business of banking, buying and selling

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exchange, and receiving deposits in this territory, on capital stock not represented by, or divided into shares, shall be taxed in the county where such person, corporation, or association is located and doing business, on the cash value of such capital stock to be estimated on the same basis of valuation as other moneyed capital in the hands of individual citizens.

"Sec. 4. The shares of national bank stock shall be entered and taxed in the name of the shareholders of the several shares thereof respectively engaged in the business of banking, and whose capital stock is not divided into or represented by shares, shall be entered and taxed in the name of such person, corporation or association.

"Sec. 5. Upon the demand of the assessor, the president, cashier or other officers in charge of an incorporated national bank association, shall make out and deliver to said assessor, a sworn statement showing the number of shares of said national bank ; the name and residence of each shareholder and the number and amount of shares owned by him. Every shareholder of said national bank shall, in the town or city where said national bank is located, render at their actual cash value to the assessor of taxes, all shares owned by him in such national bank ; and in case of his failure to do so, the assessor shall list and assess such unrendered shares as other unrendered property. The taxes due upon the shares of banking corporations shall be a lien thereon, and shall be paid by the cashier or president of such national bank or banking institution and shall be a lien against and assessed to such shares of stock, and no banking corporation shall pay any dividends to any shareholder who is in default in the payment of taxes due on his shares ; nor shall any banking corporation permit the transfer on its books, of any shares, the owner of which is in default in the payment of his taxes on the same. That the taxes due on shares of national banks shall be a lien on the same, and no corporation or association shall permit any dividends to be paid to any holder of any such shares,

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or permit any transfer of the same on its books until the tax thereon shall have been paid.

"Sec. 6. That in the event any president, cashier or other officer in charge of any national bank or other corporation or association engaged in the business of banking in this territory, shall refuse, on the demand of the assessor, to file with said assessor, a sworn statement showing the number and amount of shares of said national bank, or association or corporation, the name and residence of each shareholder, and the number and amount owned by him, as demanded; the said assessor shall at once in the name of the territory, at his relation, institute proceedings in *mandamus*, to compel the statement to be so filed; and in the event of such failure in addition to the taxes due, the said officer, president or cashier, or managing agent so refusing shall forfeit an amount equal to double the amount of said taxes, to be recovered by the county in a civil action as for debt, and go into the school fund of such county where such national bank or association is located; said action to be brought by and in the name of said county.

"Sec. 7. That this act shall take effect," etc.

A cursory reading of the act will disclose bad punctuation, many omissions, and contradictory provisions. Particularly is this true of section 4 of the act. If we adhere strictly to the punctuation and wording of this section, the result is manifest absurdity and inconsistency. It is a settled rule of construction of statutes that where such a result follows a strict adherence to punctuation and the arrangement of words, phrases, and sentences, evident mistakes, omissions, and the improper use of words may be remedied, and even the structure of sentences altered, in order to arrive at the purpose and intent of the law. In section 4 there is evidently an omission between the words "respectively" and "engaged." An analysis of this section and of the preceding one will make it reasonably certain that the omitted words are, "and the capital stock of every person, corporation or association."

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By inserting a comma after the word "respectively," and adding thereafter the omitted words above given, the section will then read: "The shares of national bank stock shall be entered and taxed in the name of the shareholders of the several shares thereof respectively, and the capital stock of every person, corporation or association engaged in the business of banking, and whose capital stock is not divided into or represented by shares, shall be entered and taxed in the name of such person, corporation or association."

1. Was the assessment in question one upon the capital stock, or one upon the shares of stock, of the bank? There is a clear distinction between capital stock, as that term is used in its precise sense, and the shares of stock, of a corporation. The former is the property of the corporation, and the latter is the property of the individual holders of such shares. Inasmuch as the names of the shareholders, and the correct number of shares owned by each, in the Western Investment Banking Company, were stated in the assessment, it is quite evident that the intent was, not to tax the capital stock of the bank, but the shares of stock owned by the individual stockholders.

Banks—Taxation
of Shares—Assessment.

2. Were these shares of stock incorrectly listed and assessed in the name of the bank? As we have seen, the correct reading of section 4 is "that the shares of national bank stock shall be entered and taxed in the name of the shareholders of the several shares thereof respectively." No reference is here made to other than the shares of national bank stock. By the provisions of section 6, however, it is made the duty of the officer in charge of any banking association, upon the demand of the assessor, to file with this officer a sworn statement showing the number and amount of shares of such corporation, the names and residences of the shareholders, and the number and amount of shares owned by each. If the purpose of the act was to provide that

Same—Same—
Same.

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only the shares of national bank stock should be entered and taxed in the names of the holders thereof, then the provision in section 6 would be without reason or purpose. We think, therefore, the intent of the act was to provide that the shares, not only of national banks, but also of other corporations or associations engaged in the business of banking in this territory, should be listed and assessed in the names of the individual holders thereof. Other provisions of the act, however, make it the duty of the cashier or president of all banks to pay the taxes due upon the shares of stock, and protect such officer in such payment by creating a lien against such shares of stock, and in prohibiting such banks to pay any dividends to any shareholder who is in default in payment of taxes due on his shares, and in prohibiting such banks from transferring on the books any shares the owner or owners of which may be in default in the payment of the taxes due on the same. While, properly, shares of stock in a banking institution should be listed and assessed in the names of the holders thereof, the act, whether or not it makes it the mandatory duty of the officer in charge to pay the taxes, at any rate authorizes and permits such payment by such officer, and protects him in so doing. The relation of agency is thus created, and it therefore makes little or no difference whether the shareholders in the first instance pay the taxes, or whether the managing officer of the corporation pays the taxes due on the shares. At best, the assessment, therefore, on the shares of stock in the name of the bank, is a mere irregularity, and one which will not warrant the equitable interference of the court. It has been repeatedly held that where the objection is to the mere mode of taxation, and does not go to the justness of the tax itself, equity will afford no relief. *State Railroad Tax Cases*, 92 U. S. 575 ; *Cooley, Tax'n*, p. 336.

3. It is claimed by the appellant that it is not a banking institution, within the meaning of section 1 of

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the act. The Western Investment Banking Company is a corporation organized under the general incorporation act of the territory, and, as Banking Associations—Definition. appears from the statement of its cashier, is engaged in the business of receiving money, and investing it for its depositors, by loaning it in their names, and also of collecting rents, and interest due on such loans as the bank may make. The interest and rents thus collected are subject to check by those for whom they are collected. The bank charges a commission on its loans to the borrowers, and also a commission on the collection of interest and rents made by it. The record does not disclose whether, under its articles of incorporation, the bank is thus restricted in its business or not; but, assuming that under its articles it has no power to engage in any other than its present business as described by its cashier, does it properly belong to the category of banking associations? In *Warren v. Shook*, 91 U. S. 704, MR. JUSTICE HUNT, speaking for the court, said: "Having a place of business where deposits are received, and paid out on checks, and where money is loaned upon security, is the substance of the business of a banker." Again, in *Oulton v. Institution*, 17 Wall. 109, the following definition is given of a bank: "Strictly speaking, the term 'bank' implies a place for the deposit of money, as that is the most obvious purpose of such an institution. Originally the business of banking consisted only in receiving deposits, such as bullion, plate, and the like, for safe-keeping, until the depositor should see fit to draw it out for use. But the business, in the progress of events, was extended; and bankers assumed to discount bills and notes, and to loan money on mortgage, bond, or other security, and at a still later period to issue notes of their own, intended as a circulating currency and as medium of exchange, instead of gold and silver. Modern bankers frequently exercise any two, or even all three, of those functions; but it is still true that an institution prohibited from exercising any more than one of those

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functions is a bank, in the strictest commercial sense." We think, under these definitions, the Western Investment Banking Company is now engaged in the business of banking, and, as its name indicates, is a banking association, within the meaning of section 1 of said Act No. 51, and that its shares of stock are therefore taxable.

4. Was the taxation of the bank's real estate and personal property, and also of its shares of stock, illegal because in conflict with paragraph 2630, Rev. St., which declares that nothing in the revenue act shall be construed to require or permit double taxation, or in conflict with paragraph 2633, which reads: "Shares of stock in a corporation possess no intrinsic value over and above the actual value of the property of the corporation for which they stand and represent and the assessment and taxation of such shares and also of the corporate property would be double taxation. Therefore all property belonging to corporations shall be assessed and taxed, but no assessment shall be made of shares of stock, nor shall any holder thereof be taxed therefor." Is Act No. 51, given above, to be construed as repealing the provisions of these sections in so far as they pertain to the assessment of shares of stock of banks and banking institutions? The principle which underlies paragraph 2633 is that the taxation of shares of stock in a corporation, and also of the corporate property, is, in effect, taxation of the same property. Whether, as an abstract proposition, this be sound or not, we are not concerned, inasmuch as it is the expression of the legislative will. It follows, then, that it is immaterial, so far as the principle is concerned, whether the taxation be upon the property of a corporation or upon the shares of stock. Under the method pointed out for the taxation of corporate property in paragraph 2633, national banks, under the provisions of section 5219, Rev. St. U. S., escaped taxation upon all of their corporate property, including shares of stock, except such real estate as such banks

Double Taxation—
Construction of
Statute.

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might hold. It is doubtless for this reason that the legislature passed the act approved April 13, 1893, of which Act No. 51, Laws 1897, is an amendment. It is hardly conceivable that the legislature, even if it were assumed that it had the power so to do, would provide for what it has termed "double taxation" in the case of banks and banking institutions, while relieving all other corporations within the territory from this burden. A just and reasonable construction put upon Act No. 51 is that it is therein intended that all corporations within the territory, including national banks, which otherwise would be exempt, shall bear their just burden of taxation; and, in order to effect this purpose in the case of banks, the shares of stock shall be assessed and taxed, and not the corporate property, while in the case of other corporations within the territory the assessment shall be upon the corporate property, and not upon the shares of stock. By thus construing the act, consistency is given it, and it is made harmonious with the clearly expressed policy of the revenue laws as contained in paragraphs 2630, 2633, Rev. St., which neither by direct reference nor by necessary implication are repealed, so far as the underlying principle is concerned, by either the act approved April 13, 1893, or by Act No. 51 of the Laws of 1897.

The theory of the appellant is altogether at variance with the conclusion we have reached as to the construction to be given to Act No. 51. Relief was not sought against the enforcement of the assessment upon the bank's property, but was sought against the enforcement of the assessment and the levy of taxes against the shares of stock of the bank; and as we have held that the latter tax is valid, and there is no such irregularity in the mode and manner of the taxation as to warrant equitable relief, the judgment of the court below must be affirmed.

DOAN and DAVIS, JJ., concur.

Nassau Bank v. National Bank of Newburgh

NASSAU BANK

v.

NATIONAL BANK OF NEWBURGH *et al.*

(*Court of Appeals of New York, June 6, 1899.*)

Deposits of Money Acquired by Forgery—Recovery from Bank Defrauded by Depositor.—When a bank had lost a certain sum by paying a forged draft, but was in ignorance of such loss, the forger deposited that amount with the bank and disappeared; and, subsequently, the bank discovered its loss, and another bank claimed the deposit as the proceeds of a check forged by the same person and paid by it. *Held*, that the first-mentioned bank could retain the deposit to make good its own loss; even though it was the proceeds of the forged check.

APPEAL by plaintiff from Second department appellate division, supreme court. *Affirmed.*

On April 22, 1897, Grant B. Taylor opened an account with the plaintiff, the Nassau Bank; and among other deposits made by him that day, and credited to his account, was one of a draft for \$6,000 drawn by the Columbus Trust Company of Newburgh, N. Y., upon the Chase National Bank of the City of New York, in favor of Charles Currie. Taylor wrote Currie's name upon the back of the draft, and then his own, upon making the deposit. Upon presentment the drawee paid to the plaintiff the amount of the draft. Over a month later, upon being informed by the Chase Bank that Currie's indorsement was forged, and a demand being made for repayment, the plaintiff repaid to it the amount collected upon the draft. It appears, and such is the finding of fact, that Currie had no interest in, nor connection with, the draft, and there is no explanation offered by the evidence of its origin or purpose. Taylor had drawn out substantially all of the amount to his credit with the plaintiff, and had disappeared.

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Thereupon the plaintiff, finding that the sum of \$2,400 had been paid to the defendant the Newburgh Bank, and was still on deposit there, commenced this action to recover the same, as part of the proceeds of the draft alleged to have been fraudulently used by Taylor. Prior to opening the account with the Nassau Bank, Taylor had drawn out of the Newburgh Bank, the sum of \$2,400, by means of forged checks purporting to have been made by the executors of the estate of John L. Aderton, and to that extent had diminished the amount to the credit of the estate in the bank. On May 3d he deposited with the Newburgh Bank a check for \$2,400 drawn by him upon the plaintiff to the order of the estate of John L. Aderton, and indorsed, also, by him, "For deposit est. John L. Aderton, by G. B. Taylor." The amount of the deposit was credited to that estate, and the check was collected from the plaintiff; the payment being charged by it to Taylor's account. At the time when the deposit of \$2,400 was made, neither the Newburgh Bank nor the executors of Aderton's estate were aware of Taylor's forgeries, and the consequent loss thereby of that amount of money; nor were the latter aware of the deposit, which made good the amount theretofore withdrawn from the estate account, until the commencement of this action, wherein they are made parties defendants. The referee found against the plaintiff, and directed a judgment dismissing its complaint, which judgment was affirmed by the appellate division, in the Second department.

John M. Gardner, for appellant.

Howard Thornton, for respondents.

GRAY, J. (after stating the facts). I think that the case was correctly decided, and that little need be added to what has been already said. The circumstances were very peculiar with respect to the draft for \$6,000 which Taylor caused to be collected and placed to his credit. The payee, Currie, had no knowledge of nor interest in it, as he testified, and it would appear that

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his name had been made use of in some way and for some purpose which are not explained. Whether, however, the draft was made payable to a fictitious payee, though an existent person, and hence, as one payable to bearer, was effective to pass title to its proceeds when collected by the plaintiff bank, is a question which might well admit of assertion and discussion upon the facts. See *Coggill v. Bank*, 1 N. Y. 113; *Phillips v. Bank*, 140 N. Y. 556, 35 N. E. 982. But it is unnecessary, when the decision of the case may rest upon plain and well-settled legal propositions. The situation may be said to be, in certain aspects, new; but I see no good reason for denying to it the application of the rule that when money has been received by a person in good faith, in the usual course of business, and for a valuable consideration, it cannot be pursued into his hands by one from whom it has been obtained through the fraud of a third person. If it has been used, as it is claimed in the present case, to pay an indebtedness owing by the third person, with innocence in the recipient, there is a consideration for its payment by him, which, despite the fraud through which the money was obtained, and for reasons based upon policy and the need for such security in ordinary commercial transactions, supports and protects its possession against the world. The following cases establish and will illustrate the application of these principles: *Justh v. Bank*, 56 N. Y. 478; *Stephens v. Board*, 79 N. Y. 183; *Hatch v. Bank*, 147 N. Y. 184, 41 N. E. 403.

But it is the claim of the appellant that, conceding the doctrine of the cases, it is not available in the present case, for the reason that the money paid into the Newburgh Bank by Taylor was not received or accepted by it with knowledge of his forgeries. It is argued that the mere deposit by Taylor of the money, without the knowledge of or the acceptance by his creditor, could not constitute payment, within the rule. I am unable to recognize the force of the contention. Taylor was a debtor, by reason of his forgeries, as well

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to those who were injured in their property rights thereby, as to the law for his criminal act ; and it is of no conceivable importance, in my opinion, that the existence of the fact of indebtedness should be unknown at the time when he sought to make reparation by repaying the moneys feloniously taken. Having made the payment, he could not reclaim it, and no interest in the moneys remained in him. It satisfied the claim which the bank undoubtedly possessed against him, and discovery or knowledge of such a claim was not necessary to its existence. Nor is it of consequence as to how the payment operated in its mode. He conceived that he had despoiled the Aderton estate, and therefore made the payment in such form as to reimburse it ; but the fact was that the bank's claim against him was satisfied, and that the credit of the amount to the estate upon the account in the bank's books satisfied the claim of Aderton's executors. The bank received the money lost through the forgeries, and it became the debtor of the executors for the money received. Taylor's plan, evidently, was to make restoration in such a form as that his forgeries would not be exposed. I think MR. JUSTICE CULLEN, who delivered the opinion at the appellate division, admirably expressed it when he said : "Where one person defrauds another so skillfully that the party defrauded is ignorant of his loss, and restitution is made so adroitly that it does not disclose the original offense, does any different rule obtain from a case where one confesses his fault and openly makes restitution ? We apprehend that there can be no distinction between the two cases, and that the very statement of the question precludes the possibility of but one answer." I think that the judgment should be affirmed, with costs. All concur. Judgment affirmed.

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McDonald *v.* Chemical Nat. Bank (U. S.), 657.

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Columbia Nat. Bank v. German Nat. Bank (Neb.), 43.

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Dickson *et al. v. Baker et al.* (Minn.), 140.

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First Nat. Bank of Concord, N. H. *v. Hawkins* (U. S.), 635.

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Gill *v. First Nat. Bank* (Tex.), 28.

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Corn Exchange Nat. Bank *v.* Solicitors' Loan & Trust Co. *et al.* (Pa.), 120.

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Union Nat. Bank of Kansas City *et al. v.* Hill *et al.* (Mo.), 443.

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Refusal of correspondent to honor check does not constitute act of insolvency on part of bank drawing it.

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First Nat. Bank of Grand Forks, N. D. *v.* Anderson (U. S.), 89.

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